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THE ROANOKE RAPIDS CASE

In the Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 28 and 29

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL., RESPONDENTS

AND

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' BRIEF

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ABBREVIATIONS

Appalachian —Appalachian Electric Power Company.
(App. p.—) —Refers to the Appendix to this Brief printed as a separate volume.
Carolina —Carolina Power and Light Company.
Commission —Federal Power Commission.
(Comm'n, p.—) —Refers to the Commission's Brief in opposition to the Petitions for Writs of Certiorari.

H. Doc. 650	—House Document No. 650, 78th Congress, second session.
(I,—)	—Refers to the printed record. The Roman numerals denote the volumes and the Arabic numerals denote the pages therein.
NACA	—National Advisory Committee on Aeronautics.
(R.—)	—Refers to the unprinted record certified by the court below.
REA Association	—Virginia REA Association and its member cooperatives.
Respondents	—The Commission, VEPCO, Appalachian and Carolina, or any of them.
Secretary	—Unless otherwise indicated, means the Secretary of the Interior.
SEPA	—Southeastern Power Administration.
VEPCO	—Virginia Electric and Power Company.
(VEPCO, p.—)	—Refers to VEPCO's Brief in opposition to the Petitions for Writs of Certiorari.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' BRIEF

These cases are before this Honorable Court on writs of certiorari issued to review a judgment of the United States Court of Appeals for the Fourth Circuit, denying petitions to set aside an order of the Federal Power Commission (Commission) which granted a license to the

Virginia Electric and Power Company (VEPCO) for the construction of a hydroelectric project at Roanoke Rapids, on the Roanoke River in North Carolina.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (V, 29) is reported at 191 F. (2d) 796. The opinion and order of the Commission appear at Vol. I, pp. 41–78 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act. The basis of jurisdiction was set forth in the petition for writ of certiorari, and is included in the Statement of the Case herein (pp. 4–6, *infra*).

STATUTES INVOLVED

The pertinent statutory provisions discussed in this brief are set forth in the Appendix hereto, pp. 1–43.

QUESTIONS PRESENTED

The questions presented by the petitions for writs of certiorari are as follows:

I. Whether the Secretary of the Interior (Secretary) and the Virginia REA Association and its member cooperatives (REA Association) are parties "aggrieved" by the Commission's order, and whether they have standing in court to seek a review of such order under Section 313 (b) of the Federal Power Act (App. p. 41).

II. Whether, under Section 10 of the Flood Control Act of 1944 (App. p. 22), adopting a comprehensive plan consisting of 11 project units, the Government has entered upon the improvement of the entire Roanoke River Basin for flood control and other purposes, and whether the Roanoke Rapids site, which would be occupied by one of the units in the plan, has thus been withdrawn from the licensing jurisdiction of the Commission.

III. Whether, under Section 7 (b) of the Federal Power Act (App. p. 36), the Commission, by its previous approval of a comprehensive plan for Federal development of the Roanoke River Basin, including a project unit at Roanoke Rapids, was prohibited from approving VEPCO's application.

HISTORICAL BACKGROUND

Respondents noted a "significant lack" of historical discussion showing that, in the 1936 Flood Control Act, Congress embarked on a new policy (Comm'n, p. 26). We agree that a historical treatment of the role of multiple-purpose developments in flood control and power legislation is helpful to the consideration of the questions involved in this case. We have therefore included a historical sketch on the subject in the Appendix hereto, pp. 48–81.

THE FEDERAL POWER POLICY

For an understanding of the issues in this case it is also helpful to have a summary view of the

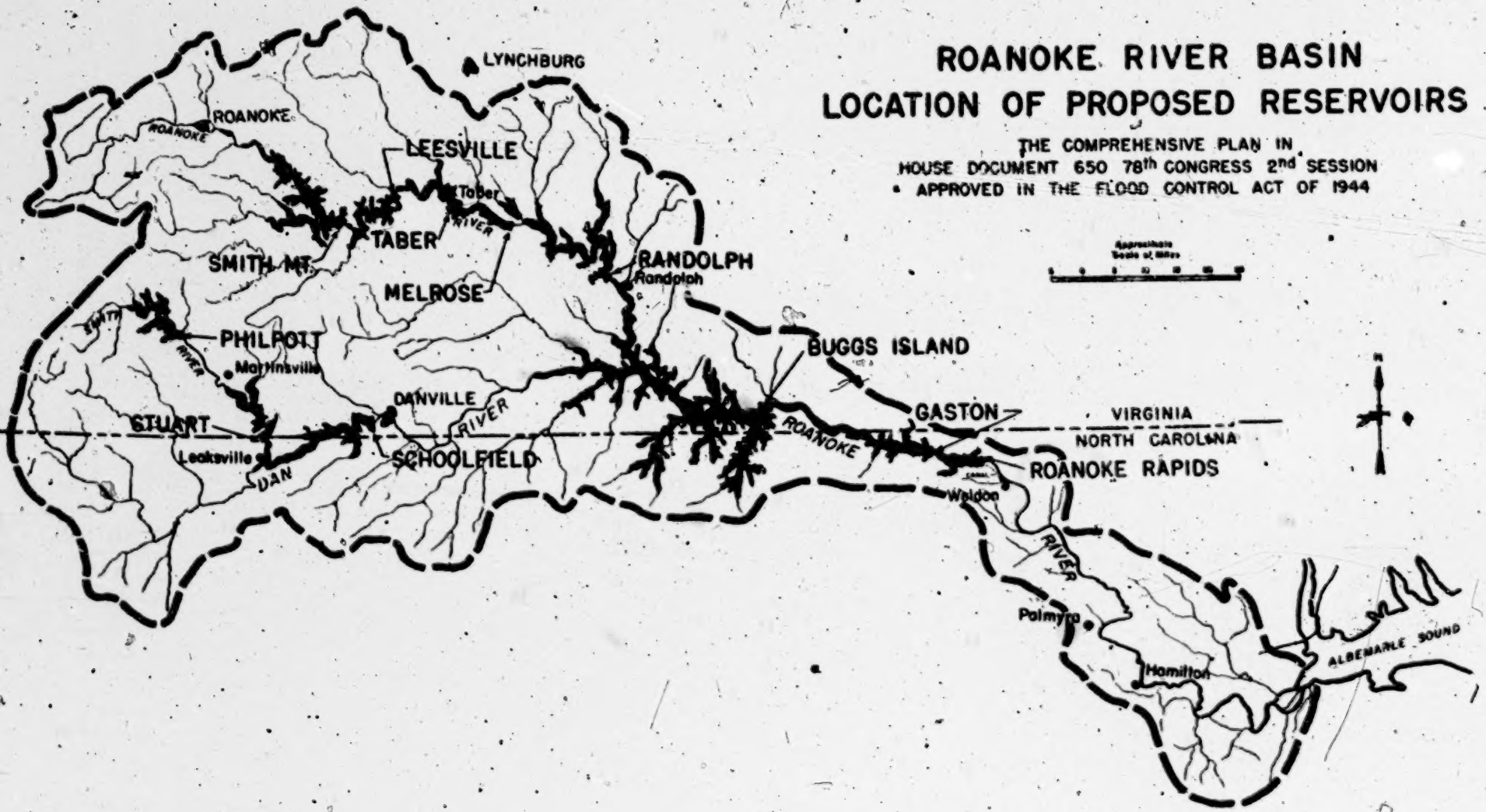
Federal Power Policy and of the systematic opposition of the private power industry thereto. A brief sketch on this subject also is included in the Appendix hereto, pp. 90–101.

STATEMENT OF THE CASE

On October 6, 1948, VEPCO filed an application for a license to construct a hydroelectric project at Roanoke Rapids on the Roanoke River in North Carolina, at approximately the same site as that of the Roanoke Rapids unit in the comprehensive plan for the improvement of the Roanoke River Basin, approved by Congress in Section 10 of the Flood Control Act of 1944 (see map opposite this page).

The Commission requested the Secretary to submit his comments on this application (VI, 1), and the Secretary replied that he objected to the issuance of a license, both on jurisdictional and substantive grounds (VI, 2). The Commission then issued an order setting the application for hearing before an Examiner (VI, 10).

The Secretary, acting in his representative capacity as the head of the Department of the Interior, and the REA Association filed their respective petitions for intervention in opposition to the issuance of such license (VI, 12, 20). Petitions for intervention in support of VEPCO's application were filed by Appalachian Electric Power Company (Appalachian) (V, 17–21), and by Carolina Power and Light Company (Caro-



ROANOKE RIVER BASIN
LOCATION OF PROPOSED RESERVOIRS

THE COMPREHENSIVE PLAN IN
HOUSE DOCUMENT 650 78th CONGRESS 2nd SESSION
APPROVED IN THE FLOOD CONTROL ACT OF 1944

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lina) (V, 10–11). On May 6, 1949, the Commission issued an order granting the petitions of the REA Association, Appalachian, and Carolina (V, 22), and later granted the Secretary's petition to intervene (I, 71).

After extensive hearings, the Examiner recommended that a license should be granted to VEPCO (III, 1045 *et seq.*, 1107 *et seq.*). Exceptions were filed by the Secretary and the REA Association to the Examiner's decisions (R. 5715 *et seq.*, 5992 *et seq.*; see also App. pp. 219–234). On January 26, 1951, the Commission issued its opinion and order sustaining the recommendations of the Examiner (I, 41–78).

Pursuant to Section 313 (a) of the Federal Power Act (App. p. 41), the Secretary and the REA Association filed their respective petitions for rehearing (R. 6056 *et seq.*, 6105 *et seq.*). These petitions were denied by the Commission on March 1, 1951 (R. 6110).

Within the time permitted by Section 313 (b) of the Federal Power Act (App. p. 42), the Secretary and the REA Association filed their respective petitions in the United States Court of Appeals for the Fourth Circuit to review and set aside the Commission's order granting the license (I, 1–40). The court ordered that the two petitions be consolidated, set the consolidated cause for argument, and admitted Appalachian and Carolina as interveners (V, 14, 27). On

October 1, 1951, the court rendered its opinion and order denying the petitions to set aside the Commission's order (V, 29–47).

Petitioners then filed their respective petitions for rehearing, asserting that the court had erroneously decided the questions presented, and invited the court's attention to the fact that it had based some of its conclusions upon incorrect statements of Petitioners' contentions (V, 47 *et seq.*, 68 *et seq.*). On November 5, 1951, the court below denied the petitions for rehearing (V, 64, 72).

Within the time permitted by law, and extended by this court, the Petitioners filed petitions herein for writs of certiorari. These petitions were granted on May 5, 1952 (VI, 71).

SUMMARY OF ARGUMENT

Part One

I. A party is "aggrieved" by a Commission order, if the interests asserted by him are substantial, and they are substantially and adversely affected by the order. There is no closed category of interests, or of effects thereon, which may give a party standing to seek judicial review (pp. 15–17, *infra*).

II. The question of Petitioners' standing was not properly before the court below. The Commission had no standing to raise the question, because it had recognized their interests by requesting the Secretary's comment on the appli-

cation, by ordering a hearing on the objections raised by him, and by granting Petitioners leave to intervene. Their interests are not lessened by the fact that Petitioners seek judicial review. *The Chicago Junction* Case, 264 U. S. 258, 268, is controlling on this point (pp. 18–23, *infra*). VEPCO had no standing to raise this question, because it had not exhausted its administrative remedies (pp. 23–25, *infra*). By considering this question, which is really an objection to the Commission's order granting intervention, the court below exceeded the statutory scope of review (pp. 25–26, *infra*).

III. Petitioners are parties "aggrieved" by the Commission's order and have standing in court, because they have complied with all procedural requirements (pp. 26–36, *infra*) and have substantial interests which are adversely affected by the Commission's order.

In the Secretary's intervention before the Commission, and in his proceeding to review the Commission's order, the United States was and is the real party in interest. The Secretary is charged with a responsibility sufficient to invoke the aid of the courts to protect these interests of the United States (pp. 36–43, *infra*). The United States may appear in court as *parens patriae*, but there are specific interests which are adversely affected and which give it standing in court (pp. 43–45, *infra*).

The Secretary's interest is in the disposition

of power from Government projects in accordance with the Federal Power Policy established by Congress—a policy to prevent monopolization, and to effect the most widespread use of power in such manner that the consumers will benefit by the lowest possible rates consistent with sound business principles (App. pp. 96. *et seq.*). VEPCO's application is part of a plan to disrupt the Federal Power Policy (pp. 46–53, *infra*). In the disposition of power in the Roanoke Basin area, the Secretary is in competition with VEPCO, and the competitor interest is of great magnitude (pp. 53–58, *infra*). Both the immediate and the long range effects on the Secretary's interest are very substantial in terms of electric power, in terms of money, and especially in terms of principles (pp. 58–62, *infra*).

REA Association's interests are substantial, especially the interest to make power available to rural consumers at the lowest rates consistent with sound economy and prudent management (pp. 62–63, *infra*). These petitioners have both a competitor interest and a consumer interest and these interests are substantially and adversely affected by the Commission's order (pp. 63–66, *infra*).

IV. The court below erred in the following particulars: in following an erroneous test of aggrievement, not only in conflict with the decisions of this Court, but also in conflict with the provisions of the Federal Power Act and with

its own action in this very case (pp. 67–70, *infra*); in failing to assume the validity of Petitioners' substantive contentions (pp. 70–72, *infra*); in minimizing Petitioners' interests and the effect of the Commission's order thereon, by characterizing the Secretary's interest as being limited to the disposition of "surplus" power (pp. 72–76, *infra*), by holding that he had no more responsibility with respect to construction of projects than has the Postmaster General (pp. 76–78, *infra*), by interpreting Section 5 as conferring no right, interest or responsibility in any project or its development (pp. 78–88, *infra*), by holding that the only interest of the REA Association was to purchase power from the Secretary (pp. 88–89, *infra*), and by holding that Petitioners' grievance related only to the sale and purchase of power from Roanoke Rapids (pp. 89–90, *infra*); and in holding, in effect, that Petitioners' interests, and the effect of the Commission's order thereon, are contingent and remote (pp. 90–99, *infra*).

Part Two

I. In 1929, VEPCO applied for a license to construct a project of 25,000 kw at Roanoke Rapids. After the Army Engineers submitted their "308 report" recommending that there should be no Federal development, VEPCO withdrew its application in 1935 (pp. 100–1, *infra*). After Congress authorized investigations to be made for flood control and power purposes on

the Roanoke River and its tributaries, after the Chief of Engineers recommended a feasible comprehensive river basin plan to be adopted on a step-by-step basis, with Buggs Island and Philpott as the initial step, after Congress approved the plan and appropriated funds for the construction of Buggs Island, and while Buggs Island was under construction, VEPCO again filed an application for Roanoke Rapids, now for a project of 91,000 kw (pp. 101–10, *infra*). At the same time, Colonel Gee of the Army Engineers appeared before the House Public Works Committee and recommended a change in the comprehensive plan, predicated on his theory that a private power company would develop Roanoke Rapids and Gaston. The Committee, however, took no action on his recommendation (pp. 111–12, *infra*). The conclusions of fact are that the Chief of Engineers recommended a comprehensive river basin plan as a Federal undertaking (pp. 112–8, *infra*), and that VEPCO was seeking a license for the construction of Roanoke Rapids, the most valuable unit in the plan, deriving its value mainly from the Government's investment in the "key project," at Buggs Island (pp. 118–23, *infra*).

II. The statutory test of whether the Government has entered upon an improvement is whether it has been "adopted by law"—not whether appropriations have been authorized, or whether construction has been authorized,

or whether funds have been appropriated, or whether construction has begun (pp. 123-36, *infra*).

III. Applying the statutory test, it is clear, without any need of interpretation, that, by Section 10 of the Flood Control Act of 1944, the Government has entered upon the entire plan for the development of the Roanoke River Basin as a single enterprise, and that this includes the site at Roanoke Rapids (pp. 136–9, *infra*).

IV. Assuming that the statute requires interpretation, an analysis of its provisions leads to the conclusion that the comprehensive plan was recommended and approved as a "single package." This is the meaning of the statutory language used in the provisions authorizing investigations (pp. 139–44, *infra*) and of the provisions undertaking the improvements, whether the criterion of "adoption" or "approval" is applied, and whether the introductory paragraph of Section 10, or the paragraph entitled "Roanoke River Basin" is applied (pp. 144–58, *infra*); the latter is not a limitation on the former (pp. 158–64, *infra*). This interpretation is in accord with the history and purpose of both the Federal Power Act (pp. 164–69, *infra*), and of the flood control acts (pp. 169–73, *infra*), and is in accord with the applicable rules of statutory construction, including the requirements that remedial legislation should be liberally construed (pp. 174–6, *infra*), that public rights should be preferred to

private rights (pp. 176–9, *infra*), and that unjust and unreasonable results should be avoided (pp. 179–87, *infra*).

V. The comprehensive plan for the development of the Roanoke River Basin has not been modified by Congress. Contrary to Respondents' contentions, the plan was not and could not be so modified by the Army Engineers as to open Roanoke Rapids to private development (pp. 188–95, *infra*).

VI. Congress having made one disposition of the Roanoke Rapids site, the Commission was without authority to make a different disposition of it. This conclusion flows not only from the Congressional approval of the comprehensive plan, but also from the language of the statute vesting the investigations and improvements in the Army Engineers, except where otherwise provided by Act of Congress (pp. 195–99, *infra*). The withdrawal of the site from the licensing power of the Commission is sufficiently plain and explicit (pp. 199–203, *infra*). It was not necessary for Congress to pass another Act withdrawing Roanoke Rapids from the Commission's licensing power, when it, or one of its branches, or one of its Committees, or its individual members was informed that an application was filed by VEPCO, and that the Commission might grant a license (pp. 203–6, *infra*).

Part Three

I. The Commission had expressed its judgment that the comprehensive plan for the development

of the water resources of the Roanoke River Basin should be undertaken by the United States (pp. 206–12, *infra*). In the alternative, there can be no question but that the Commission had expressed its judgment that Buggs Island should be constructed by the United States (pp. 212–3, *infra*).

II. VEPCO's proposed project would affect the Federal development of the water resources of the basin in that it would reduce the amount of power and the economic feasibility of the plan. The reduction in net power benefits would amount to over $1,500,000 per year or over $75,000,000 for the 50-year period of the license (pp. 214–6, *infra*). The proposed project would also reduce the capacity of the Gaston unit (pp. 216–7, *infra*). The proposed project would also reduce the quality and increase the unit cost of Roanoke River Basin power (pp. 217–8, *infra*).

Assuming that the Commission's judgment as to the development of the water resources to be undertaken by the United States related only to Buggs Island and Philpott, VEPCO's proposed project would nevertheless affect the Federal development by reducing the quality of Buggs Island power and increasing the unit cost thereof, making it less adaptable to sales to public bodies and cooperatives (pp. 218–9, *infra*).

III. Section 7 (b) of the Federal Power Act prohibits the issuance of a license for any project which would affect any water resource develop-

ment (not merely a single project) whenever, in the judgment of the Commission, such development should be undertaken by the United States (pp. 219–22, *infra*). It is not necessary that this judgment should be expressed in a proceeding upon an application for a license or that the Commission be the originator of the plan of development (pp. 223–8, *infra*). The requirement that the Commission submit its findings and recommendations to Congress is not a condition precedent to this statutory prohibition, but even if this were the case, this condition was also satisfied (pp. 228–35, *infra*). There is no period of limitations governing the statutory prohibition (pp. 235–9, *infra*). Even if there were, Congress has acted on the Commission's recommendation (pp. 239–40, *infra*). Thus the *Clark Hill* Case is not distinguishable from the case at bar (pp. 240–4, *infra*).

IV. The court below did not apply Section 7 (b) as enacted by Congress (pp. 244–6, *infra*).

ARGUMENT

The argument is divided into three parts corresponding to the questions presented in the petitions for writs of certiorari.

PART ONE. THE STANDING OF THE PARTIES PETITIONERS

In this part of the brief we propose to show (I) what is the proper test for determining

whether a party is "aggrieved" by an administrative order and therefore has standing in court, (II) that the question of Petitioners' standing was not properly before the court below, (III) that Petitioners are parties "aggrieved" by the Commission's order and have standing to seek judicial review thereof, and (IV) that the court below erred in its holding to the contrary.

I. PROPER TEST OF "AGGRIEVEMENT"

For Petitioners to have standing in court to seek judicial review of the Commission's order under Section 313 (b) of the Federal Power Act, it must appear that they are "aggrieved" by that order. This brings into question the meaning of "aggrievement".

The court below correctly observed that "some right or interest of a complaining party must be invaded to justify him in asking relief in court"[1] (V, 32). It is understood that both the right or interest and the invasion thereof must be direct and substantial.[2] If there is injury to a legal right, then the party is aggrieved as a matter

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[1] The court's reference to *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U. S. 239, is directly in point. This Court treated this case as being in the same category with *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, and held that the National Broadcasting Co. was an aggrieved party.

[2] In this connection, the court below correctly cited *U. S. Cane Sugar Refiners Assn.* v. *McNutt*, 138 F. (2d) 116, but it has no application to the case at bar (see p. 97, *infra*).

of course. But the right or interest need not be an enforceable legal right, and the invasion need not constitute "legal damage."[3] For a party to be "aggrieved" by an administrative order, it is sufficient if it has a substantial interest which is adversely affected by the order. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476–7; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 14–5. In these cases, there was no invasion of a legal right. The interests asserted by the petitioners therein were those of competitors in the radio broadcasting field, and the adverse financial effect upon their interests as competitors was held to be sufficient to constitute them as parties "aggrieved" within the meaning of the statute giving such persons a right to obtain judicial review.

The principle underlying the decisions on this subject is that a party is "aggrieved" by a commission's order, and may seek judicial review

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[3] For this reason, the court's reference to *Alabama Power Company* v. *Ickes*, 302 U. S. 464, is not in point. That case did not arise under a statute giving a right to "any party to a proceeding aggrieved by an order" to obtain a review in court. This Court distinguished the case from the *Chicago Junction Case*, 264 U. S. 258, because the latter arose under the Transportation Act of 1920, "and under Section 212 of the Judicial Code which gave any party to a proceeding before the Commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved".

under a statutory provision like that contained in Section 313 (b) of the Federal Power Act, whenever the interest asserted is substantial and is adversely affected by the order. The interest may be sovereign in character,[4] or it may be one based on a statutory right or obligation,[5] or it may be an economic or financial interest like that of a competitor in the same line of business,[6] or like that of a person in a competing line of business,[7] or like that of a labor organization,[8] or like that of a group of consumers.[9] There is no closed category to the types of interests, or to the types of adverse effects thereon, which may bring a petitioner within this provision.

This is specifically recognized both in Section 308 (a) of the Federal Power Act (App. pp. 38–9) which enumerates the types of persons that may be admitted as parties to proceedings before the Commission, and in the Commission's Rules of Practice and Procedure, providing "who may intervene" in proceedings before it (App. pp. 44–47).

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[4] *Cia Mexicana de Gas* v. *F. P. C.*, 107 F. (2d) 804, where the State of Texas was a petitioner.

[5] *Dept. of Conservation* v. *F. P. C.*, 148 F. (2d) 746.

[6] *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470.

[7] *National Coal Association* v. *F. P. C.*, 191 F. (2d) 462.

[8] *Ibid.*, with the United Mine Workers as petitioners.

[9] *Saxton Coal Mining Co.* v. *National Bituminous Coal Comm'n*, 96 F. (2d) 517, 518.

II. THE QUESTION OF PETITIONERS' STANDING WAS NOT PROPERLY BEFORE THE COURT BELOW

We submit that neither (A) the Commission nor (B) VEPCO was in any position to question Petitioners' standing, and (C) that the court below exceeded its statutory scope of review by passing on this question.

A. COMMISSION'S RECOGNITION OF PETITIONERS' INTERESTS

The Commission was not in a position to question Petitioners' standing, because it had recognized their interests by (1) inviting a report by the Secretary, (2) ordering a hearing on the issues raised by him, and (3) granting leave to Petitioners to intervene.

(1) *Inviting report of the Secretary*

Shortly after VEPCO filed its application, the Commission, in accordance with its established practice, transmitted a letter to the Secretary requesting him to submit his report on the application (VI, 1).[10] Similar letters were sent by the Commission to the Chief of Engineers (R. 5099), to the North Carolina Public Utilities Commission and the Virginia Corporation Commission (R. 5102), and to the Governors of North Carolina and Virginia (R. 5103). Such letters

[10] In this letter the Commission requested the Secretary to give his views and advice on measures which should be taken to protect fish and wildlife and "to report otherwise on the application to the extent that you may deem desirable" (Compare: Comm'n, p. 13).

were not sent to the Postmaster General, or to any other Federal department or agency, or to the Governors or Commissions of other States, except that the U. S. Public Health Service was invited to comment "with respect to the pollution control in that section of the river" (R. 5118–1). Whenever an application is filed either for a preliminary permit or for a license to construct a project, the Commission informs the Secretary and requests his comments thereon. It cannot be assumed that the Commission requests the Secretary's comments with the understanding that he has no interest in the matter.

(2) *Order of hearing on issues raised by the Secretary.*

In response to the Commission's request, the Secretary stated that he was opposed to the issuance of a license on three grounds: (a) That the project site had been reserved for Federal development; (b) that the Commission was prohibited by Section 7 (b) of the Federal Power Act from approving the application; and (c) that VEPCO's proposed project was not best adapted to a comprehensive plan for the development of the Roanoke River for power purposes [11] (VI, 2). The Commission then issued its Order of Hearing, reciting the Secretary's opposition

[11] The Department also reported on its views for the preservation of fish (Exhibits 3, 4, 5, and 6), but repeatedly stated that it did not abandon its position that VEPCO's application should be dismissed or denied (VI, 3, 6, 7, 10).

and setting the matter for hearing before an Examiner on the three questions raised by him (VI, 11). This action was in further recognition of the Secretary's interest, and is incompatible with the view that the Secretary had no substantial interest which would be affected by an adverse decision.

(3) *Grant of intervention*

If the Commission actually thought that Petitioners did not have substantial interests which would be affected by the issuance of a license, it should not have granted their petitions to intervene.

Section 308 (a) of the Federal Power Act (App. p. 38) provides:

> In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

In Section 1.8 of its Rules of Practice and Procedure (App. pp. 44–47), the Commission has set forth meticulous requirements for intervention. Interveners must show what their interests are and how such interests would be affected by an

adverse decision. This was done by both the Secretary and the REA Association.

The Commission's order granting them leave to intervene, therefore, constituted a recognition that Petitioners had substantial interests which would be affected by the issuance of a license to VEPCO. This is especially so in view of the extensive consideration given by both the Examiner and the Commission to the petitions to intervene and to the arguments in opposition thereto (pp. 27–34, *infra*). Petitioners' interests and the adverse effect of the Commission's order are not lessened by the fact that they seek judicial review. If they were properly before the Commission, they are properly before the court.

In this respect the question presented is one which was squarely decided in the *Chicago Junction* Case, 264 U. S. 258, where Justice Brandeis, delivering the opinion of the Court, said (p. 268):

> Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission, * * * the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The in-

> tervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest.

This observation applies in all respects to the case at bar.

True, in granting leave to intervene, the Commission also stated that intervention should not be construed as a recognition by the Commission that the interveners might be aggrieved by its order (I, 71; V, 22), and the court below referred to this condition as if it were significant [12] (V, 30). This condition, however, has no particular application to Petitioners herein.

In Section 1.1 (f) (13) of the Commission's Rules of Practice and Procedure, it is provided:

> Admission as intervener shall not be construed as recognition by the Commission that such intervener might be aggrieved by any order of the Commission in such proceeding.

As if that were not sufficient, the Commission repeats substantially the same language in *every* order granting leave to intervene, no matter how

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[12] The order granting intervention in *National Coal Co. et al.* v. *Federal Power Commission*, 191 F. (2d) 462, contained exactly the same limitations as those in the order granting the Secretary's petition for leave to intervene. The United States Court of Appeals for the District of Columbia Circuit, however, held that the petitioners therein were parties aggrieved by the Commission's order, without any reference to such limitations.

great may be the intervener's interest or how greatly that interest may be adversely affected.

With reference to the REA Association, the Commission also stated (I, 46) that

> these cooperatives have not shown that under the law as we must administer it they would be aggrieved by approval of the pending application.

This holding cannot affect the standing of these petitioners. The Commission did not issue an order withdrawing its grant of leave for their intervention. Had it done so, such order, as well as the order granting a license, would have been subject to judicial review. *Federal Communications Commission* v. *National Broadcasting Co.* (KOA), 319 U. S. 239, 246.

The Commission cannot both recognize and fail to recognize that Petitioners had substantial interests which would be affected by an adverse decision, nor may the Commission seek the aid of a court to extricate it from such an inconsistent position.

B. VEPCO HAD NOT EXHAUSTED ITS ADMINISTRATIVE REMEDIES

VEPCO, also, is not in a position to question either (a) the Secretary's or (b) REA Association's standing.

(a) VEPCO's opposition (VI, 16, 47, 55), to the Secretary's intervention was, in the last analysis, a contention that the Secretary had no

standing to represent the interests of the United States and that he himself had no substantial interest which would be adversely affected by the issuance of the license applied for (p. 29, *infra*). After the Examiner overruled these contentions and recommended that formal intervention be allowed, VEPCO filed exceptions to this part of the recommended decision and requested the Commission to make contrary findings (VI, 63). The Commission, however, sustained the Examiner. VEPCO did not file a petition for rehearing and, therefore, was not in a position to file a petition for a review of this part of the Commission's order. Section 313 (a) of the Federal Power Act (App. p. 41) provides:

> No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

By failing to follow these procedural requirements, VEPCO lost its right to attack the Secretary's standing in court.

(b) After the Commission granted leave to the REA Association to intervene (V, 22), VEPCO filed its answer in opposition to the petition and a motion to reconsider the order (VI, 36). The motion to reconsider could have been treated as a petition for rehearing. Section 313 (a) of the Federal Power Act provides that:

> Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.

When the 30-day period elapsed without any action by the Commission on the motion, VEPCO was at liberty to file a petition for review within 60 days. It did not file such a petition. It did not renew its attack on the order granting leave to the REA Association to intervene when the matter came before the Commission for final decision; nor did it file a petition for rehearing after the issuance of the final order. By failure to comply with the requirements of the statute, VEPCO also lost its right to attack REA Association's standing in court.

C. THE COURT BELOW EXCEEDED ITS STATUTORY SCOPE OF REVIEW

As Respondents observed (Comm'n, pp. 4–5): "The Power Act's 'distinctive formulation of the conditions under which resort to the courts may be made', by which Congress has determined 'the scope of the jurisdiction of the lower courts' to review orders of the Commission, specifies (Section 313 (b))":

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

Respondents' attack in the court below on Petitioners' standing was actually an objection to the

orders of the Commission granting intervention, which orders were predicated on recognition of Petitioners' interests. The objection was not urged before the Commission in any petition for rehearing, nor was there any reasonable ground for this failure. Therefore, the question of Petitioners' standing was not within the court's scope of review under the statute.

III. PETITIONERS ARE PARTIES "AGGRIEVED" BY COMMISSION'S ORDER

Assuming that Respondents could properly attack Petitioners' standing, and that the court below did not exceed its statutory scope of review, we submit that Petitioners have standing in court, because (A) they have complied with all procedural requirements, and (B) their interests are substantial and are adversely affected by the Commission's order.

A. PETITIONERS HAVE SATISFIED ALL PROCEDURAL REQUIREMENTS

We are at a loss to understand the pertinence of Respondents' statement (Comm'n, p. 5) that failure to satisfy the statutory requirements "necessitates dismissal of a petition for review of a commission order without reaching any question as to its validity". Throughout the proceedings before the Commission and in the court below, Petitioners meticulously observed all procedural requirements, both statutory and administrative, in order to safeguard their standing in court.

The facts relating to the procedural aspects are as follows:

(1) On April 25, 1949, the Secretary filed his petition to intervene (VI, 12). He asserted that he was appearing in his representative capacity and that he had an interest which would be substantially and adversely affected by the issuance of a license for a project at Roanoke Rapids, namely: (a) that by Section 5 of the Flood Control Act of 1944 (App. p. 19) he was constituted as the marketing authority for the power generated at reservoir projects under the control of the Department of the Army, to be disposed of by him in accordance with the standards therein prescribed; (b) that Congress, by section 10 of the Flood Control Act of 1944 (App. p. 22), adopted and approved a comprehensive plan for the development of the Roanoke River Basin, including project units at Buggs Island and Roanoke Rapids; that Buggs Island would involve a great investment on the part of the Government, resulting in net power benefits at Roanoke Rapids; and that the net power benefits are, under the law, to be distributed by the Secretary among the people in the area in accordance with the standards and limitations prescribed in Section 5; and (c) that the issuance of a license for Roanoke Rapids and the withdrawal of this project from the Congressionally-approved comprehensive plan would affect the Secretary's functions in the disposition of power from Buggs Is-

land and other units of the comprehensive plan, in that the power available for disposition by him would be diminished and the cost thereof would be increased.

(2) A petition to intervene in opposition to the application was also filed by the REA Association (VI, 20). They asserted (a) that they were non-profit rural electric cooperatives financed by loans of public funds through the Administrator of the Rural Electrification Administration; (b) that they were organized and were functioning for the purpose of making electric service available in rural areas at the lowest rates consistent with sound economy and prudent management, thereby raising the standard of living of rural inhabitants; (c) that they were engaged in the business of distributing and selling electric power to some 40,000 member consumers in rural areas in the vicinity of the Roanoke River Basin, in competition with VEPCO; (d) that under Section 5 of the Flood Control Act of 1944 they were entitled to a preference in the purchase of power from Federal projects in the Roanoke River Basin at cost; (e) that if Roanoke Rapids and Buggs Island were owned and operated together, the power could be produced at less cost than at Buggs Island alone, and that, therefore, it is to their interest and that of their consumers that the United States construct both the Buggs Island and the Roanoke Rapids projects; (f) that their interest would be directly, substantially and

adversely affected by the granting of a license; and (g) that their interest was not adequately represented by the existing parties in the proceeding before the Commission.

(3) VEPCO (VI, 16) and the Commission's Staff (VI, 25) filed answers vigorously opposing the Secretary's petition to intervene. The common denominator of their opposition may be resolved into the following propositions: (a) that the Secretary had no interest in the proceeding; that the interest which he assumed to assert was not the interest of the Department of the Interior, but that of the United States; and that the public interest would not be served by his intervention; (b) that the Secretary was seeking to appear as an adversary of the Commission, which would make the proceeding a controversy between the United States and the United States; (c) that a difference of opinion between two agencies of the Government as to scope of jurisdiction is not a matter for decision by the courts, unless Congress, by express legislation, gives one agency authority to intervene in proceedings before another; (d) that the Commission was the sole agency charged by law to protect the interests of the United States in any licensing proceeding under the Federal Power Act, and that to permit the Secretary to intervene would be tantamount to the Commission's abdication of its functions to the Secretary; (e) that the Secretary was seeking to become a formal party in

order to be in a position to seek judicial review of the Commission's order, and that this itself was sufficient reason for denying his application; (f) that the Secretary would not have a right to obtain judicial review under Section 313 (b) of the Federal Power Act, because prior to obtaining such review he would have to file a petition for rehearing under Section 313 (a) of the Act, and this he would not be able to do, because he was not a "person" within the meaning of this section permitting the filing of petitions for rehearing; and (g) that the Secretary had not shown that the interests he asserted would not be adequately protected by the existing parties (meaning the Commission's Staff).

(4) The Secretary filed a reply (VI, 32) in which (a) he admitted that he was appearing before the Commission in his representative capacity as the head of the Department of the Interior, and that his interests were those of the United States; (b) he asserted that the controversy was not between him and the Commission, but between him and VEPCO, with the Commission acting as an impartial tribunal to determine which of the conflicting alternatives presented conformed with the law and would best serve the public interest; (c) he admitted that the Commission was charged by law to protect the interests of the United States and of the public, but asserted that it was not the sole agency so charged, because, by Section 5 of the Flood Control Act of

1944, he was charged with certain duties and responsibilities which established his right and duty to safeguard the interests of the United States in this regard, and that the proper procedure was for him to intervene in this proceeding before the Commission as the tribunal of primary jurisdiction; (d) he argued that there was no merit in the contention that by admitting him as a formal party the Commission would abdicate its functions to him, any more than there would be in an assertion that, when a court grants permission to a party to intervene, it abdicates its judicial functions; and (e) he pointed out, regarding the proposition that the Secretary of the Interior was not a "person", that he was a person within the Commission's own rules (p. 39, *infra*); that he was a person in fact, and that the law had not so far strayed from realities as to fail to recognize a fact so obvious.

(5) On May 6, 1949, the Commission entered an order granting leave to Appalachian, Carolina and the REA Association to intervene, but denying the Secretary's petition to intervene (V. 22). The order recited that "objection to such intervention by the Secretary of the Interior was filed by the applicant", but either inadvertently or erroneously failed to mention the vigorous opposition of the Staff. It held that, in acting upon applications for licenses, the Commission must of necessity consider the public rights and interests in the development of the water resources in-

volved, and that it was not necessary to admit the Secretary as a formal party, "since his assistance as a coordinate Federal agency is always welcomed in order to secure full presentation of the issues involved." For this reason, the Commission denied the Secretary's petition, but accorded him the privilege of full participation in the proceeding.

(6) The matter proceeded to a hearing before the Examiner, in which hearing the Secretary participated fully. In this proceeding, VEPCO, the Commission's Staff, Appalachian, and Carolina appeared as advocates in support of the application;[13] while the Secretary and the REA Association appeared as advocates in opposition. (I, 184–190).

(7) In view of his full participation in the proceeding before the Commission, the only manner in which the Secretary could be "aggrieved" by the order of May 6, 1949 was that, not being "a party to the proceeding" (Section 313 (b)), he might be without standing to petition the Court of Appeals to review the Commission's final order granting a license, or to appear as a party respondent in such court, if the Commission dismissed or denied the application and VEPCO sought judicial review of the Commission's order.

[13] The Staff acted in a dual capacity—according to the Examiner, as advocates in support of the application (I, 188–9); according to Staff Counsel, as the technical advisers to the Commission (I, 187).

(8) On June 6, 1949, the Secretary filed an application for reconsideration (VI. 41), reiterating the grounds for intervention in the original petition and adding a new ground, in the nature of "newly discovered evidence", that the interests sought to be protected by him were not adequately protected by the existing parties, since the Commission's Staff actually supported VEPCO's application. This application for reconsideration was vigorously opposed by Appalachian (R. 5348), by the Staff (VI, 44), and by VEPCO (VI, 47). On June 21, 1949, the application for reconsideration was denied on the ground that it did not appear that the Secretary had been refused any rights of full participation before the Commission or the Examiner (VI, 52).

(9) On June 20, 1949, this Court decided the case of *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, in which it held that the actual position of the parties, rather than their formal appearance in the caption of the case, determined the case or controversy. On June 23, 1949, therefore, the Secretary filed a second application for reconsideration (VI, 52), which was again opposed by VEPCO (VI, 55), and by the Commission's Staff (VI, 58). On August 30, 1949, the Commission entered an order granting the second application for reconsideration, but reserving the question of the Secretary's participation as a formal intervener, to be in-

cluded among the issues to be decided in the proceeding (VI, 62).

(10) Thereafter, the Examiner in his intermediate decision, filed March 17, 1950, recommended that formal intervention by the Secretary be allowed. In this connection, the Examiner said (III, 1048–9):

> It would appear that the Commission, by giving the Secretary the right of participation in the proceeding before it, must have felt that such participation may be in the public interest and appropriate to the administration of the statute under which this proceeding is brought, even though he might not be a necessary or indispensable party. It is considered also, upon the record that the Secretary does have an interest sufficiently substantial adequately to support his request for the status of intervener, * * *.

(11) The Staff acquiesced in the decision of the Examiner (R. 5990); Appalachian (R. 5983) and VEPCO (VI, 63) excepted to this part of the decision, and the Commission sustained the Examiner (I, 71).

(12) After the Examiner rendered his decision recommending the issuance of a license, Petitioners filed their Exceptions in conformity with the Commission's rules. When the Commission rendered its decision and order, Petitioners filed their petitions for rehearing in conformity with Section 313 (a) of the Federal Power Act. After these

petitions were denied, they filed their petitions for review in conformity with Section 313 (b) of the Act.

In view of these facts, Petitioners have met all procedural requirements, both administrative and statutory, for becoming proper parties to the proceeding.

We feel that we must emphasize again that, from the beginning, Petitioners' adversary in this case was not the Commission, but VEPCO. There was no substance to the claim that, by permitting the Secretary to intervene, the Commission would abdicate its functions to him (p. 29, *supra*).

When Petitioners filed their petitions for review in the court below, there was no occasion for the Commission to claim, as it did, that the Secretary was seeking to become an "uninvited partner" in the Commission's determinations. The Secretary sought no such role. On the contrary, when the Commission in its order of May 6, 1949 (V, 22) stated that the Secretary's formal intervention was not necessary, because his assistance was "always welcomed"; that might have been construed as an offer of partnership. The Secretary, however, declined such offer, but chose to appear before the Commission, like any other interested party, subject to all the limitations imposed on interveners and without expectation of any special privileges.

When the Court of Appeals decided against Petitioners, they pursued the remedy provided in

Section 313 (b) of the Federal Power Act by applying for writs of certiorari. Here, also, there was no occasion for the Commission to assert (Comm'n, p. 13) that the Secretary was seeking to exercise "supervisory control over the Commission". We submit that such an assertion has no more substance than to say that *any person* seeking review of a commission order or of a court decree assumes to exercise "supervisory control" over the commission or the court.

B. PETITIONERS' INTERESTS ARE SUBSTANTIAL AND ARE ADVERSELY AFFECTED BY THE COMMISSION'S ORDER

Petitioners herein are aggrieved by the Commission's order granting a license to VEPCO, in the sense that they have substantial interests which are substantially and adversely affected by this order. In No. 28 herein, a question is involved whether the real party in interest is the United States, or the Secretary of the Interior as an officer of, but separate and distinct from, the United States. Our position is that whichever view one takes, the result is the same. We shall, therefore, demonstrate that (1) the United States, (2) the Secretary, and (3) the REA Association are parties "aggrieved" by the Commission's order.

(1) *The United States is the real party in interest and is aggrieved by the Commission's order*

Where a proceeding is instituted against an officer of the United States charging that, acting

under color of office; but without authority of law, he is doing a wrong, the proceeding is against him in his individual capacity.[14] But where a proceeding is instituted against a public officer of the United States in his *representative* capacity, that is, as an agent acting within the scope of his authority, the proceeding is one against the United States. Even where it is alleged that the public officer acts beyond the scope of his authority, but the relief sought would run against the United States, the proceeding is one against the United States.[15] Likewise, when an officer of the United States institutes, or intervenes in, a proceeding in his representative capacity, whether in his own name or in the name of the United States, the real party plaintiff, petitioner or intervener is the United States.[16] In the proceeding before the Commission, the Secretary intervened in his representative, not in his individual, capacity. Hence, the real party intervener was the United States.

While, in the proceeding before the Commission, Respondents not only recognized, but urged, that the Secretary's intervention meant intervention by the United States (p. 29, *supra*), they argued in the court below that the United States had no standing, because it was not a party to the pro-

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[14] *Land* v. *Dollar*, 330 U. S. 731, 736.

[15] *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Mine Safety Company* v. *Forrestal*, 326 U. S. 371, 374–5.

[16] *Benton* v. *Woolsey*, 12 Pet. (37 U. S.) 27, 30.

ceeding before the Commission. They also argued that the United States could not petition for rehearing and, therefore, could not seek a review of the Commission's order, because it was not a "person" within the meaning of Section 313 (a) of the Act. They relied on *United States* v. *Cooper Corporation,* 312 U. S. 600, but they overlooked the special circumstances in which this Court so held with reference to the term "person" within the meaning of Section 7 of the Sherman Antitrust Act. There, this Court warned that there was no hard and fast rule of exclusion.[17]

Mr. Justice Roberts, delivering the opinion of the Court, said (p. 605):

> The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

An entirely different situation is presented by the Federal Power Act, where Section 309 (App. pp. 39–40) provides:

> For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

Pursuant to this delegation of authority, the Commission in its Rules and Regulations defined the

[17] See also *Georgia* v. *Evans,* 316 U. S. 159, 161–2.

term "person" as follows (18 C. F. R. 1.1 (f) (1)):

> "Person" means and shall include individuals, partnerships, corporations, associations, joint stock companies, public trusts, organized groups of persons, whether incorporated or not, receivers or trustees of the foregoing, municipalities, including cities, counties, or other political subdivisions of a State, States of the Union, including the District of Columbia or any territory of the United States, *or any agency, authority or instrumentality of the United States, or any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly, by the United States, or by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty.* [Emphasis supplied.]

The Secretary was properly before the Commission in his representative or official capacity as an agency or instrumentality of the United States, and therefore the United States was a party to the proceeding before the Commission. Whether the United States is or is not itself a "person", it was a party before the Commission through the person (*per sonum*) of the Secretary of the Interior.

It is conceded, as the court below said (V, 31), that before a public officer may attack

an administrative order before the courts, he must be able to point to an interest, for which he is charged with responsibility, that may be adversely affected by the order. Such interest is found in the duties and responsibilities of the Secretary relating to the conservation and utilization of the water resources of the Nation, and especially in Section 5 of the Flood Control Act of 1944, vesting in him the duty and responsibility of transmitting and disposing of power from Army projects in accordance with the Federal Power Policy laid down by Congress (pp. 46–53, *infra*).

Even if the granting of the license were within the Commission's discretion, and it exercised its discretion in such a manner as to invade or encroach upon or prejudice the ability of the Secretary to carry out the laws of the United States for the execution of which he is responsible, it would be not only his right but his duty to invoke the interest of the United States in an effort to prevent such action by the Commission.

The court below impliedly held that the Secretary had no interest which would warrant his going to court for the protection of the interest of the United States, because "the safeguarding of that interest has been confided to the Power Commission" (V, 31). Apart from the fact that in so holding the court begged the question (pp. 70–72, *infra*), its reasoning is grounded on the fallacy that, because the Commission is charged with

the responsibility of determining whether development of water resources for public purposes should be undertaken by the United States, as provided in Section 7 (b) of the Federal Power Act, there is, therefore, no interest, duty or responsibility in the Secretary of the Interior. It assumes that the Commission is the sole guardian of the interest of the United States in this respect, to the exclusion of all other agencies of the Government.

We do not deny that the Commission, insofar as it acts within the limits of its statutory authority, represents the interests, and stands in the position, of the United States. This does not mean, however, that, in the development of the Nation's water resources, the Commission is the sole guardian of the interests of the United States. Where the bodies of water involved are international boundaries, the Secretary of State also represents interests of the United States. Under the flood control acts and under the river and harbor acts, the Secretary of the Army also represents the interests of the United States. Under the Reclamation laws and under the flood control acts, the Secretary of the Interior also represents the interests of the United States. Whether one or another agency of the Government gives proper effect to these interests may have to be resolved, and in a *case or controversy* the proper method is by such judicial review as is provided by law.

The real contention behind the opposition to the standing of the United States, through the Secretary of the Interior, to invoke judicial review of the Commission's order was clearly stated by VEPCO in its opposition to the Secretary's intervention as follows (VI, 18–19):

> The Federal Power Act clearly places the responsibility for final decision with respect to the interest of the United States solely upon the Federal Power Commission. That is the Commission's function. That is why it was created. Persons, whose interest is other than that of the United States have recourse in appeal, if aggrieved. But, so far as the interest of the United States is concerned this Commission is the final arbiter.

Similar arguments were advanced by Respondents in their opposition to the petitions for writs of certiorari (Comm'n, pp. 9–11; VEPCO p. 38).

The fallacy inherent in these arguments is that Respondents overlook the fundamental reason why a private party may obtain judicial review of the Commission's order. Because of the fact that such a party is adversely affected, economically or financially, the statute gives him a right to vindicate the public interest,[18] for the Commission may issue licenses only if it is in the public interest to do so. As this Court said in *Scripps-Howard*

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[18] This also answers the Commission's reference to "public defender" statutes (Comm'n. p. 13).

Radio, Inc. v. *Federal Communications Commission*, 316 U. S. 4, 14:

> The Communications Act of 1934 *did not create new private rights.* The purpose of the Act was *to protect the public interest* in communications. By Section 402 (b) (2), Congress gave the right to appeal to persons "aggrieved or whose interests are adversely affected by Commission action. * * * *But these private litigants have standing only as representatives of the public interest.* [Emphasis supplied.]

The same propositions apply to the provisions of the Federal Power Act. If a private party aggrieved by an order of the Commission may appear to vindicate the public interest, it would follow as a matter of course that the United States or a public officer thereof, charged with statutory responsibilities, may appear to vindicate the public interest.

Since the United States, through the Secretary, was a party before the Commission, and has complied with the procedural requirements, it is sufficient to say that the United States has an interest as *parens patriae*, and therefore has standing in court.[19] Specifically, however, the interests of the United States and the manner in which they are adversely affected by the Commission's order are as follows:

(a) Assumption of jurisdiction by the Commis-

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[19] *In re Debs*, 158 U. S. 564, 584; *United States* v. *Minnesota*, 270 U. S. 181, 194.

sion to issue a license for a project site reserved by Congress for Federal development adversely affects both the sovereign and proprietary interests of the United States.

(b) The Commission had already expressed its judgment that the development of the water resources of the Roanoke River Basin should be undertaken by the United States itself. The issuance of a license for Roanoke Rapids, which is the most valuable of the project units in this river basin development, adversely affects the development of the river basin by the United States.

(c) The United States has a sovereign interest in the orderly process of Government. When a Commission reverses its recommendation upon which Congress had relied in enacting legislation, this interest of the United States is adversely affected.

(d) The United States has a proprietary interest in the power potentials of its own hydroelectric projects. The order issuing a license in this case results in the surrender of huge potential power assets of the United States. In this respect, also, the interests of the United States are adversely affected by the order.

(e) The United States has an interest in the welfare of the consumers of electric power and in the proper execution of its laws, including Section 5 of the Flood Control Act of 1944. Any interference with, or burden imposed on, the

Secretary of the Interior in the performance of his responsibilities under this law adversely affects the interests of the United States.

In these circumstances, it cannot be maintained that the United States is not the real party in interest, or that it is not "aggrieved" by the Commission's order.

(2) *The Secretary is a party "aggrieved" by the Commission's order*

As the head of the Department of the Interior, the Secretary is charged with many duties and responsibilities relating to land and water resources, which involve or are affected by the development of power, especially hydroelectric power. His interest in hydroelectric projects is not limited to those undertaken by the Federal Government, but extends to all such projects, both public and private, as has been recognized by the Commission (pp. 18–19, *supra*).

In order not to overstate our case, we present the Secretary's interest herein as being limited to the disposition of power from Government projects in accordance with the Federal Power Policy. To demonstrate that the Secretary is an "aggrieved" party, we shall discuss (a) his concern with the maintenance of the Federal Power Policy, (b) his competitor interest in the Roanoke River area, and (c) the effect of the Commission's order.

(a) *Secretary's concern with the Federal power policy*

Under Section 5 of the Flood Control Act of 1944, the Secretary is charged with the responsibility of transmitting and disposing of power from all reservoir projects under the control of the Department of the Army in conformity with the Federal Power Policy (App. pp. 90–101).

Succinctly, the Policy is to conserve and utilize the water power resources, through multiple-purpose developments, and to distribute the benefits thereof to the people in the respective areas in such a manner as to encourage the most widespread use of power at the lowest possible rates to consumers consistent with sound business principles.

This is not a new policy, nor any radical departure from established principles, but one which has evolved over half a century (App. pp. 57–8, 59–61, 67, 70–76), patterned after the functions and duties which under the law attach to public utilities, i. e., persons engaged in a public calling. To encourage the most widespread use of power is analogous to the duty of a public utility to serve the public generally and to make its service available to all that need it.[20] To dispose of power in such a manner that the consumers will pay the lowest possible rates consistent with sound business principles is analogous

[20] *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 309.

to the duty of a public utility to render service at "cost" (including the cost of capital).[21]

The Federal Power Policy is implemented by the following statutory standards governing the disposition of power by the Secretary:

(i) To dispose of power in such a manner as to encourage the most widespread use thereof;

(ii) To dispose of power in such a manner that the consumers would pay the lowest possible rates consistent with sound business principles;

(iii) To sell power at rates calculated to return the cost of generation and transmission, including amortization of the investment allocated to power;

(iv) To give preference to public bodies and cooperatives; and

(v) To construct and acquire only such transmission and related facilities as are necessary for the disposition of power in wholesale quantities to preference and other customers.

These standards complement each other. "Most widespread use" does not mean such wide dispersal as to dissipate the benefits flowing from the sale of low cost power. It means, rather, the marketing of the power in such a manner that its low cost would stimulate greater use of power and would also operate as a competitive force in bringing about progressive sales methods and lower prices of private power. Encouragement

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[21] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603; also *Mo. ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276, 291.

of most widespread use of power on this basis can best be effected by giving preference in the sale of power to public bodies and cooperatives. This method of selling power also means disposition of it in such a manner that the consumers will benefit therefrom at the lowest possible rates, and itself results in greater consumption and in more widespread effective use of power. Of course, the lowest possible rates must be consistent with sound business principles which means that the cost of power, including the investment allocated to power, with interest thereon, would be borne by the consumers. The provision as to acquisition or construction of transmission facilities has the effect of avoiding duplication of facilities and keeping down the cost of power consistent with the other standards.

To the Secretary was delegated the discretionary function so to balance these standards that the disposition of the power would carry the maximum benefits to the people.

The application of the Federal Power Policy has been marked by a continuous economic struggle with the monopolistic tendencies which Congress sought to prevent[22] (App. pp. 93–101).

(i) VEPCO's president, himself, testified that his Company had opposed the Government's construction of the Buggs Island unit in the Con-

[22] See *Power Districts: An Emerging Device for Low Cost Electricity*, 60 Yale L. J. 483, 486. See also *Report of the President's Water Resources Policy Commission*, Vol. I, pp. 228–9.

gressionally-approved comprehensive plan.[23] Even after Congress had authorized the appropriation of funds, VEPCO employed agents to oppose the construction of this unit. It desisted in this effort only when, as the witness testified, it was "convinced that the people living in the valley really wanted the dam" (II, 1015–17). After VEPCO saw that it could not defeat the construction of the Buggs Island unit, it joined in the requests for appropriations for its construction, but only because it expected that all or at least half of the power from Buggs Island would be turned over to it, and that Buggs Island would be so operated that it would be dependable on VEPCO's system.[24]

(ii) VEPCO took the position that the *Clark Hill case*[25] was decided on the narrow ground that Congress had already appropriated funds and that Federal construction had been commenced on the project. (See VEPCO, p. 25.) VEPCO, therefore, filed this application for Roanoke Rapids, for which appropriations have not yet been authorized. This application, however, like the one for the Clark Hill project, strikes at the

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[23] Compare with Col. Gee's statement (App. p. 152).

[24] VEPCO's Exhibit 29 (R. 3796 *et seq.*) and its entire evidence as to the feasibility of its proposed project at Roanoke Rapids are based on the assumption that the power features of the Buggs Island unit would be operated for VEPCO's benefit (II, 729–731).

[25] *Savannah River Electric Co. v. Federal Power Commission*, 167 F. (2d) 408.

heart of the Congressional policy for development of river basins.

(iii) VEPCO appeared in opposition to the application filed by the Old Dominion Electric Cooperative for leave of the Corporation Commission of Virginia to issue a note for an REA loan (for the construction of a transmission line and a steam plant, so that the Virginia rural cooperatives might avail themselves of Buggs Island power) and it successfully persuaded the State Commission to deny the application.[26]

(iv) VEPCO constructed or acquired three transmission lines to the Buggs Island dam, thus blocking the disposition of the power, except at the bus bar, unless duplicate transmission facilities were constructed.

(v) It appeared before the Appropriations Committees of Congress in opposition to Interior's request for appropriations for the construction of a transmission line from Buggs Island to Langley Field, Virginia, for the transmission of power to the N. A. C. A. (p. 55, *infra*). After appropriations were granted, it appeared again and successfully persuaded the Appropriations Committees to revoke the appropriation made.

(vi) It offered to wheel power from Buggs Island at rates which were unconscionable and which would result in giving VEPCO a preference in the disposition of power (I, 362).

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[26] *In the Matter of Old Dominion Electric Cooperative*, 86 PUR (N. S.) 129.

(vii) VEPCO thus put itself in the position of being able to demand that all of Buggs Island power be sold to it at the bus bar, so that *it* might resell some of the power to public bodies and cooperatives.[27] SEPA refused to negotiate on this basis.

(viii) It combined with other power companies in the Southeast to oppose appropriation of a "continuing" or "revolving" fund to SEPA.

(ix) It finally negotiated a contract with SEPA under which VEPCO will receive two-thirds of the dependable capacity, of which up to 60,000 kw. will be made available by it to the Government's customers. In addition, VEPCO is to receive two-thirds of the nondependable capacity of the Buggs Island project. The contract thus provided for the sale of a very substantial part of the power to a private power company at the bus bar, with no reservation to public bodies and cooperatives of any power over and above 60,000 kw. for future growth.

(x) The Secretary was confronted with the choice of entering into this contract, or letting the power be wasted. In approving contract negotiations on this basis, the Under Secretary wrote to the Administrator of SEPA as follows:

> We have reviewed your draft of the proposed contract with the Virginia Electric & Power Company and you may pro-

[27] House Hearings on Interior Department Appropriations for 1953, p. 1569.

> ceed to complete your negotiations. Passing on this contract, I wish to emphasize that I am doing so out of necessity, and not because I think that this contract fully conforms with our obligations under Section 5 of the Flood Control Act of 1944. Even if the contract provided for complete preference in the sale of power to public bodies and cooperatives, I do not think that the United States Government should enter into such contracts in the circumcumstances which surrounded the negotiations. With the construction and acquisition of transmission lines by VEPCO, with the obstacle it put in the way of the Old Dominion Electric Cooperative which prevented the latter from constructing a steam plant and a transmission line, and with VEPCO's successful efforts preventing the construction of transmission lines by the Government, we are put in a position of being compelled to enter into this contract. The only alternative is that the power from the Kerr [Buggs Island] Project would be wasted, and this we cannot permit.

And the Secretary, in approving the contract, said (Press release, September 2, 1952):

> I am approving this contract as the best we can do under the circumstances, but I feel that the United States, like any other contracting party, should be able to enter into contracts with a free will, rather than under compulsion.

Thus the application for a license for Roanoke

Rapids is part and parcel of a program to disrupt Federal development of water resources and to prevent distribution of power in accordance with the Federal Power Policy. It is part of a program for rendering ineffective Section 5 of the Flood Control Act of 1944. This is of direct interest and concern to the Secretary in view of his statutory responsibilities.

(b). *The Element of Competition*

As we have said at the beginning of this argument (p. 17, *supra*), there is no closed category of the types of interest which, if adversely affected, would constitute a party "aggrieved" by an administrative order. The interest of the Secretary in the development of water resources generally, and in the development of the Roanoke River Basin in particular, is one of great magnitude which warrants his seeking judicial review of the Commission's order granting a license for Roanoke Rapids. However, if the interest asserted must be found in the niche of a type of interest already held to warrant a party to obtain judicial review, it is clear that the competitive element of the public power program gives the Secretary such standing in court.

In the disposition of power, the Secretary's economic and financial responsibilities are twofold: On the one hand, he must make certain that the full and undiminished benefit of the power will inure to the consumers in the area

on as widespread a basis as possible. On the other hand, he must make certain that the full cost of the power, including the cost of the investment allocated to power, will be recovered from the consumers, so that no part of the cost will constitute a burden on the taxpayers.

Wherever possible, his obligation is to sell the power generated at Government projects to public bodies and cooperatives. At the same time, it is also important that power should not be wasted. Therefore, in conformance with the Federal Power Policy, the Secretary has adopted the practice (if such preference customers are not available, or if their power requirements are not sufficient to absorb all of the power) of selling the power to privately owned utilities, reserving, however, so much of the power as may be utilized by preference customers in the future (I, 309–11).

In the disposition of power in the Buggs Island-Roanoke Rapids area to public bodies, cooperatives and others, the Secretary is in competition with VEPCO. Hundreds of pages in the record in this case are devoted to testimony as to the amount of power which would be required by Federal establishments, State facilities, municipalities and cooperatives now served or intended to be served by VEPCO, and as to what should be the distribution of the power from Buggs Island in order to effect two results: *first*, to comply with the standards laid down by Congress in Section 5 of the Flood Control Act of 1944;

and *second*, to utilize to the maximum advantage the power generated at Buggs Island (I, 279–356, 388–566).

The competition between the Secretary and VEPCO is not mere theory. It is a very real and keen competition[28] illustrated by the following facts:

(i). Before SEPA began negotiating with the National Advisory Committee on Aeronautics (NACA) to supply power for a wind tunnel at Langley Field, Virginia, VEPCO had offered to sell power to NACA, provided the latter would pay a "connection charge" in the sum of $4,000,000. When SEPA and NACA were about to conclude a Memorandum of Understanding for the sale of power, and the former sought and obtained appropriations to construct a transmission line between Buggs Island and Langley Field, VEPCO appeared before committees of Congress, first in opposition to the grant of appropriations, and later to urge revocation of

[28] In his argument before the Senate Committee on Appropriations on H. R. 7176, 82d Congress, 2d Session, the president of Carolina referred to these assertions in our petition for writ of certiorari as "startling statements". He, however, emphasized the importance of this competition as follows (p. 1130):

"I want to tell you gentlemen, in my opinion it is competition to the death for private utilities in that area if you gentlemen give them what they ask for."

Startling or not, the competition is real and is an admitted fact, though exaggerated by Carolina.

the appropriations made. At the same time VEPCO offered a contract to NACA in which it eliminated its demand for any "connection charge" and offered to sell power at rates which would meet the rates of SEPA.[29] This illustrates the reality and effectiveness of public power competition.

(ii) VEPCO has been furnishing power to the rural electric cooperatives in Virginia at one cent per kwh. (II, 1010). The Old Dominion Electric Cooperative obtained a loan from the Rural Electrification Administration for the purpose of constructing a transmission line and a steam plant. It then entered into a Memorandum of Understanding with SEPA for the purchase of 35,000 kw. of Buggs Island power (I, 566; also Exhibit 91). The Cooperative applied to the Corporation Commission of Virginia for approval of its certificate to be issued for the loan. VEPCO appeared in opposition and persuaded the Commission to deny the application (p. 50, *supra*). In presenting its opposition, VEPCO offered to furnish power to the Cooperative at an average rate of 7.5 mills per kwh., a reduction of 25%.[30] Here, again, the reality and effectiveness of the competition is illustrated.

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[29] Compare Hearings on Supplemental Appropriations for 1951, House Committee, p. 115, with Hearings on Interior Appropriations for 1952, House Committee, p. 1458, Senate Committee, p. 994.

[30] Hearings on H. R. 3790, 82nd Congress, 1st Session, before Senate Committee on Interior Appropriations, p. 1001.

(iii) VEPCO's application to the Commission for a license to construct a project at Roanoke Rapids is but one step in its effort to eliminate the competition of public power and thus to strengthen its monopolistic stronghold in the area. VEPCO's Chairman of the Board testified that the construction of the Roanoke Rapids unit by the Government would, in the long run, deprive the Company of 91,000 kw. (the capacity of its proposed project), no matter how many steam plants it might construct, as if the Company has a perpetual right to monopoly of all power production and distribution in the area (II, 1021–1023).

Respondents argue (Comm'n, p. 9) that this is not a competitor interest which would give the Secretary standing in court, because it involves neither loss of revenue (as in the *Sanders* case, *supra*), nor any reduction in the number of listeners (as in the *Scripps-Howard* case, *supra*), nor a loss of a previous market (as in *National Coal Ass'n* v. *F. P. C., supra*). In this manner, Respondents remember the examples, but forget the principle established by these decisions (pp. 16–17, *supra*).

Respondents quote (Comm'n p. 8, VEPCO, p. 25) the following statement from the Senate Report on H. R. 4485, which became the Flood Control Act of 1944 (Report No. 1030, 78th Congress, 2d Session, p. 3):

> The committee desires an amendment which provides a convenient and practical method of disposing of power at projects under the control of the War Department *without setting up a public power trust which would be unduly competitive with established private power utilities.* [Emphasis supplied.]

This falls far short of any showing that the Secretary has no competitor interest, either in fact or in law. Of course, in delegating the function to dispose of power from Army projects to the Secretary of the Interior, Congress did not establish a "public power trust". In view of the facts pertaining to the monopolistic practices of electric utilities (App. pp. 96–101), it is also clear that the Secretary's disposition of power is not "unduly competitive". When the Committee used the words "unduly competitive", it must have recognized that the disposition of power generated at Army projects would be *competitive* with private power in the respective areas. There would have been only one way of disposing of the power without its being competitive with private power companies; namely, by selling all the power to them at the bus bar. Congress could not have intended such a result, for then the preference provisions in Section 5 would have been without meaning.

Adverse effect of the Commission's order

The Secretary is aggrieved because the Commission's order substantially and adversely af-

fects his interests. Both (i) the immediate and (ii) the long-range effect should be considered.

(i) Immediate effect of the order

The immediate effect of the Commission's order is to withdraw the Roanoke Rapids site from the Congressionally-approved river basin plan. In terms of power, it means the withdrawal of 58,800 kw. capacity and 357,700,000 kwh. of energy per year (I, 154–155). Since the full utilization of the capacity of Buggs Island would require its operation at a low load factor of 23%, the power from Roanoke Rapids would serve to render the Buggs Island power more salable and more valuable. In other words, the power that would be available to the Secretary for disposition in accordance with the Federal Power Policy is diminished both in quantity and quality.

In terms of money, the withdrawal of the Roanoke Rapids unit means a reduction of the feasibility ratio of the comprehensive plan from 1.47 (I, 144–145) to 1.34 (I, 222), representing an annual reduction of $1,481,600 in gross power benefits, or $901,400 in net power benefits[31] (I, 144). This, however, is an understatement of

[31] By "gross power benefits" we mean the cost of alternative equivalent power produced under private financing. By "net power benefits" we mean the "gross power benefits" less the Federal cost of producing this power, representing the gain to the purchasers of Federal power as compared with their purchase of private fuel generated power.

the actual effect, because these figures are based on 1941 estimates. Based upon 1948 estimates (as of the time of the hearing before the Examiner), the withdrawal of the Roanoke Rapids unit from the comprehensive plan would mean a reduction of $2,669,000 in gross power benefits or $1,518,000 in net power benefits per year (I, 223). Over the 50-year period of the license, the losses would be approximately $135,000,000 and over $75,000,000, respectively.

Not only does the withdrawal of the Roanoke Rapids unit from the comprehensive plan mean a loss of power available for distribution under Section 5 of the Flood Control Act of 1944, but also an increase in the cost of generation per unit of power, so that the power will not be distributed at the "lowest possible rates to consumers consistent with sound business principles". The uncontradicted evidence shows that the cost of power from Buggs Island alone would be 5.10 mills per kwh. If Buggs Island and Roanoke Rapids were operated as a single enterprise, however, the average cost of generation would be 4.16 mills per kwh. (I, 279–290). This difference of approximately one mill per kwh., applied to Buggs Island power is a very substantial amount (over $430,000 per year).

(ii) Long-range effect of the order

While the immediate effect of the order is great, its effect on the principles involved is overwhelming.

(*a*) The order jeopardizes all river basin developments approved by Congress, by making their realization contingent upon the nonissuance of licenses by the Commission.

In every comprehensive river basin plan, some project units are more desirable than others. If Congressionally-approved comprehensive plans do not preclude the licensing of their constituent project units, then it is to be expected that private power companies will seek licenses for the development of those project sites which are economically most advantageous, leaving for Federal development only the least feasible projects. If licenses are granted for the most advantageous projects, the Congressionally-approved comprehensive plans will be disrupted, and the Secretary's functions under Section 5 of the Flood Control Act of 1944 will be rendered ineffective.

(*b*) The order vitiates the principle that the river basin must be the basic unit of water resources development, if the maximum benefits are to be realized, and puts beyond reach any coordination or integration of river basins on a regional basis. This also means that the effectiveness of the Secretary's functions under Section 5 would be greatly diminished.

(*c*) The order operates against the Congressionally-established principle that public power should be so disposed of as to encourage the most widespread use thereof at the lowest possible rates to consumers.

To obtain this result, it is essential that the cost of generation and transmission be the lowest possible. In addition, it is important that the amount of public power distributed should be large enough to constitute an effective competitive element in the distribution of power in the area. Experience has shown that, with such an effective competitive element, power rates are lowered and consumption of power is increased, with resulting benefit both to consumers and to private power companies (App. pp. 92–3).

(*d*) The order operates to surrender in large measure the benefits of the Government's investment in upstream developments to private power companies, and to prevent the distribution of such benefits among the people in the area, in accordance with Section 5.

(3) *The REA Association is aggrieved by the Commission's order*

The interests of the REA Association have already been stated (pp. 28–9, *supra*). We should like to emphasize that one of the interests of the cooperatives is to make electric service available in rural areas at the lowest rates consistent with sound economy and prudent management. This is an interest sufficient to constitute these petitioners as parties aggrieved by an adverse order, for an essential objective of lower rates is to increase the use of electricity, thus contributing to improved farm economy. Here again, if it is

necessary to point to particular elements which fit into the types of interests already recognized as being sufficient for invoking judicial review, such elements are present here. They are (a) that the REA Association are competitors of VEPCO in the sale of power in the area, and (b) they are representatives of consumers of power in the area.

(a) Competitor interest

These petitioners, as rural electric cooperatives, are engaged in the business of selling and distributing power in competition with VEPCO. They have a substantial interest in the question whether a license should be granted for a project which is a unit in a Congressionally-approved comprehensive plan. The presence of public power in the area, available to petitioners under Section 5 of the Flood Control Act of 1944, gives them an assured source of low cost power which enables them to compete with VEPCO. It is a well-established fact that the introduction of low cost public power in an area furnishes a competitive element which reduces electric power rates throughout the area (App. pp. 91–2). The impact of public power competition on the rates charged by private utility companies is especially felt in the rates charged to rural cooperatives. As the President's Water Resources Policy Commission recently reported (Report, Vol. I, p. 229):

> * * * in areas in which an authorized Federal agency was actively marketing power from river basin developments, the cost of power purchased by cooperatives from private companies tended to be little more than half as high as the cost of similar power in less fortunate areas.

The President's Water Resources Policy Commission illustrated this fact by means of three tables (Vol. I, pp. 229–31). In the first table, the charges by private power companies to rural cooperatives were compared as between the Southeast and the Northeast. The second table presents a comparison of such rates as between the Southwestern and the West-North Central States. The third table compares the rates in the States of Texas and Oklahoma with those in Colorado and the Northeastern States. In the first two tables the rates charged to rural cooperatives by private power companies in States without public power is, on the average, approximately 80% greater than the rates charged by private power companies in States where public power is marketed. In the third table, it is demonstrated that for the year 1950 the former rates exceeded the latter rates by 145%. This table shows, moreover, that while the rates to electric cooperatives in 1941 started at about the same level in the regions shown, the rates were steadily reduced in the regions where public power appeared as a competitive force, whereas in the regions without public power competition the charges to rural co-

operatives either remained stationary or actually increased by 1950.

Under Section 5 of the Flood Control Act of 1944, Petitioners have a statutory right to a preference in the purchase of power generated at reservoir projects under the control of the Department of the Army. The Secretary of the Interior is required to sell power to them at cost, and they have entered into a Memorandum of Understanding for the purchase of power from Buggs Island. The withdrawal of Roanoke Rapids from the comprehensive plan will have a substantial effect on the cost of generation of power in the Buggs Island-Roanoke Rapids area, with the consequence that these petitioners will have to pay more for the power they purchase. Their financial interests are adversely affected, not only by way of increased rates, but also in the impairment of their ability to offer lower rates to their members to assure all the advantages of expanded use of electricity. They are therefore "aggrieved" by the order of the Commission.[32]

(b) *Consumer interest*

The REA Association are also purchasers of power in wholesale quantities. As cooperatives they represent and are directly concerned with the interest of their members, who are consumers.

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[32] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476–7; *Scripps-Howard Radio, Incorporated* v. *Federal Communications Commission*, 316 U. S. 4, 14–5; *National Coal Association, et al.* v. *Federal Power Commission*, 194 F. (2d) 462.

In this capacity they have a direct interest in the rates charged both by the Secretary and by VEPCO. The Commission's order granting a license for Roanoke Rapids substantially and adversely affects that interest, because, as consumers they would have to pay higher rates to VEPCO than to the Secretary. In this respect, also, these petitioners are "aggrieved" by the Commission's order.[3]

Being aggrieved by the order, these petitioners had a right, under the statute, to invoke the aid of the Court of Appeals to review the Commission's order on *all* questions of law and fact involved within the scope of review as limited in Section 313 (b) of the Federal Power Act. They had standing in the court below, and, therefore, they have standing in this Court.

IV. THE COURT BELOW ERRED IN HOLDING THAT PETITIONERS WERE NOT "AGGRIEVED" AND HAD NO STANDING IN COURT.

In holding that Petitioners were not "aggrieved" by the Commission's order and had no standing to seek judicial review thereof, the court below erred in the following particulars: (A) In adopting an erroneous test of "aggrievement", (B) in failing to assume the validity of Petitioners' substantive claims, (C) in minimizing Petitioners' interests and the effect of the Commission's order thereon, and (D) in holding,

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[3] *Associated Industries* v. *Ickes*, 134 F. (2) 694, 697, 699-700.

in effect, that Petitioners' interests and the effect thereon were contingent and remote.

A. ERRONEOUS TEST OF "AGGRIEVEMENT"

Although the court below correctly stated the test for "aggrievement" (p. 15, *supra*), it gave only lip service to it. It actually followed a different test; namely, whether Petitioners had a "right, duty, or responsibility with respect to the construction of a power project" (V, 31). This test is not only in conflict with the decisions of this Court (p. 16, *supra*), but also (1) with the provisions of the Federal Power Act and (2) with the action of the court below in this very case.

(1) *Conflict with the Federal Power Act*

In Section 308 (a) of the Federal Power Act (App. p. 39), Congress authorized the Commission to admit as *parties* to a proceeding various classes of persons, including representatives of interested consumers or security holders, competitors, or "any other person whose participation in the proceeding may be in the public interest" (p. 20, *supra*). Then, in Section 313 (b) of the Act, Congress provided that *any party* to a proceeding aggrieved by an order may obtain a review by the Court of Appeals. Rarely, if ever, do consumers, security holders, and competitors have a "right, duty or responsibility" with respect to the construction of a power project, although their interests may be substantially

and adversely affected by an order granting o denying a license for the construction of such project. If the test followed by the court wer correct, then the Commission's orders granting o denying licenses for the construction of hydro electric projects would not be subject to judicia review, except in those rare instances, if there are any, where the petitioner has a *right, duty or responsibility* to construct a hydroelectric project.

(2) *Inconsistency with the court's own action*

The court's decision in this regard is also inconsistent with its own action in admitting Appalachian and Carolina as interveners.

They claimed that they were engaged in supplying electric energy and in the interchange of electric energy with other power companies in the area; also that they had severally contracted with VEPCO for the construction of several connections between the power systems of the companies and for the interchange of electric energy (V, 10, 17). These are claims of an interest in the proceeding, but not that Appalachian or Carolina had any "right, duty or responsibility" with respect to the construction of the Roanoke Rapids project.

The court below properly admitted Appalachian and Carolina as "parties" respondent. They were not aggrieved parties, because the Commission's order was in their favor, rather than adverse to them. This marks the difference between them and party petitioners. So far

as their *status as parties* (having standing in court) is concerned, the test is the same for both petitioners and respondents.

Although the test followed by the court below is erroneous, petitioner in No. 28 meets even this test of "aggrievement", whether the United States or the Secretary is regarded as the party petitioner. If anyone has a "right" to construct a hydroelectric project on a navigable stream, it is the United States, and, as will be shown, the Secretary is charged with duties and responsibilities "with respect to the construction" of (though not to construct) the hydroelectric project [34] (pp. 80–88, *infra*, also App. pp. 56, 90–1).

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[34] We are at a loss to understand why Respondents argued (in the court below) that under Section 5 of the Flood Control Act of 1944 the Secretary had no power "to compel" the construction of such project, or (in opposition to the petitions for writs of certiorari herein) that he had no "control over the construction of any dam under the control of the War Department" (Comm'n, pp. 7–8).

It is admitted that the Secretary has no power to "compel", and has no "control over", the construction of such projects. He never claimed such power. Had he been vested with such power, there would have been no need for him to appear before the Commission in opposition to VEPCO's application. He appeared before the Commission because he was not endowed with authority to construct, or to compel, or to control, the construction of the Roanoke Rapids unit. This does not mean, however, that he has no responsibilities with respect to the construction of hydroelectric projects, or that he has no interest in the construction of Federal projects (pp. 80–83, *infra*), or that, if the Commission erroneously licenses a project site reserved for Federal development, he has no standing to seek judicial review of the order issuing such a license.

With reference to the petitioners in No. 29, it is admitted that they do not have any "right, duty or responsibility" with respect to the construction of a project at Roanoke Rapids. It is respectfully submitted, however, that this is not the proper test for determining whether they are parties "aggrieved" by the Commission's order.

B. FAILURE TO ASSUME THE VALIDITY OF PETITIONERS' CONTENTIONS

An attack on a petitioner's standing in court to seek judicial review of an administrative order is in the nature of a motion to dismiss a complaint for the want of a proper party plaintiff.[35] Just as in determining whether a plaintiff has standing in court, one must assume that the facts stated in the complaint are correct, so, also, in determining whether a petitioner has standing in court to question the validity of an administrative order, it must be assumed that the order is invalid "for the precise reasons set forth in the petition."[36] It would be begging the question to hold that the administrative order is valid, or to resolve any issues in favor of its validity, in order to determine whether the petitioner may be heard on the validity of the order.

Here, Petitioners claimed that the Commission's order was invalid, because (1) Congress

[35] *Chicago Junction case*, 264 U. S. 258; 262-3; *Aluminum Company of America* v. *Federal Power Commission*, 130 F. (2d) 415, 446.

[36] *Associated Industries* v. *Ickes*, 134 F. (2d) 694, 699.

has by law adopted the improvement of the Roanoke River Basin, including the Roanoke Rapids site, as a Federal undertaking, and (2) by Section 7(b) of the Federal Power Act the Commission was prohibited from approving VEPCO's application. These propositions were to be established and they should have been assumed to be correct in passing on the question whether Petitioners had standing in court to seek judicial review of the Commission's order.

(1) In passing on Petitioners' standing, the court below held that "no duty or responsibility [on the part of the Secretary] can possibly arise until the Government has authorized the project and entered upon its construction" (V, 31). The court thus overruled Petitioners' claim that the Commission's order was invalid, because the Government had entered upon the development when it was "adopted by law" (pp. 123–6, 141–4, *infra*). "Adoption" of a project generally precedes any authorization of construction, or any authorization of funds for construction, or the actual construction. By thus deciding this issue, in determining whether Petitioners had standing to raise it, the court below begged the question.

(2) The court below also held (V, 31):

> Whether a project shall be developed by the government or under license by private enterprise is a matter which Congress has committed, not to the Secretary or to

> cooperatives who may desire to purchase power from him, but to the discretion of the Commission.

Here, again, the court below committed the common fallacy of *petitio principii*, for this was also one of the substantive issues in the case. This, however, is not the only fallacy. The statement quoted would make it appear that it was Petitioners' position that Congress had committed the determination of whether a project should be developed by the government either to the Secretary or to the cooperatives. Such was never Petitioners' contention.[37]

C. MINIMIZING PETITIONERS' INTERESTS AND THE EFFECT OF THE COMMISSION'S ORDER

Fairness requires that, in the determination of whether a petitioner has standing in court, full recognition should be given to the facts relating to his interest and to the effect of the order thereon. These facts should not be whittled down to a minimum in order to arrive at a conclusion that the interest or the effect is unsubstantial. To the

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[37] Apparently on the basis of the court's statement quoted above, the Commission charges Petitioners with having committed a logical fallacy, stating (Comm'n, p. 14):

"But the logical fallacy in this argument is the assumption that if a site is not within the licensing jurisdiction of the Commission, it must necessarily be within some power of the Secretary."

This, indeed, would have been a logical fallacy, if such an argument had been made. But such argument was never made by Petitioners.

contrary, where there is a reasonable doubt in this respect, justice requires that the facts and the law should be resolved in the petitioner's favor. If such doubts are so resolved; the respondent is not hurt, since he will have his day in court when the merits of the issues are considered. If, however, doubts are resolved against the petitioner, then he will be deprived of his day in court. The right to obtain judicial review of administrative action is a valuable right of which a person should not be deprived, unless his appeal for judicial review would constitute an abuse of the court's jurisdiction.

In its opinion, the court below minimized Petitioners' interests and the effect of the Commission's order thereon by (1) emphasizing that the Secretary's interest was limited to the disposition of "surplus" power; (2) holding that the Secretary had no more duty or responsibility with respect to the construction of projects than had the Postmaster General; (3) interpreting Section 5 of the Flood Control Act of 1944 as conferring on the Secretary no right, interest or responsibility in any power project or its development; (4) holding that the only interest which the REA Association had was to purchase power from the Secretary; and (5) holding that the only aggrievement which Petitioners had asserted related to the sale and purchase of power from the Roanoke Rapids Project.

(1) *Minimizing the Secretary's interest as being limited to disposal of "surplus" power*

In interpreting Section 5 of the Flood Control Act of 1944, the court below held that the statute "merely provides how the surplus power developed at government projects shall be disposed of"; adding: "The only responsibility of the Secretary relates to the disposal of surplus power from government projects" (V, 31).

We submit that this is not an accurate characterization of the Secretary's responsibilities in the disposition of power from Government projects. The court's emphasis that the Secretary is charged with the responsibility of selling "surplus" power gives the impression that the amount of power is merely something "that remains after the use or need is satisfied" (Webster's New International Dictionary). If this were the case, then there might have been some justification for the court's statement that the Secretary "has, in fact, no responsibility whatever with respect to the disposal of power produced by any project until the Secretary of the Army has certified that in his opinion it is not needed in the operation of the project" (V, 31). This is not so, either in law or in fact.

Section 5 of the Flood Control Act of 1944 provides:

> Electric power and energy generated at reservoir projects under the control of the

> War Department *and in the opinion of the Secretary of War not required in the operation of such projects* shall be delivered to the Secretary of the Interior, * * *. [Emphasis supplied.]

There is no mention here of any "surplus" power. The provision as to power needed for the operation of the projects simply means that such power may be used by the Army Engineers without purchase and without transfer of funds. This is a sensible construction of the provision. It does not mean that until the Secretary of the Army, after the construction of a project, issues a certificate to the effect that a designated amount of power is not needed for the operation of the project, the Secretary of the Interior has no duty or responsibility with respect to the disposal of the power. The Secretary of the Army never did issue such certificates, and the Secretary of the Interior has been disposing of power generated at Army projects ever since the passage of the Flood Control Act of 1944.

Indeed, it would be very odd if the Secretary of the Army did undertake to issue such certificates, since the amount of power needed for the operation of projects is an insignificant part of the power output. A search of the records of the power generated at Government projects discloses that, on the average, approximately 0.38% of the power output is needed for the operation of

the projects themselves.[38] In these circumstances, the "surplus" power is some 99.62% of the power generated. On this basis, out of the 357,700,000 kwh. (the average annual output of the Roanoke Rapids unit in the comprehensive plan), the "surplus" not needed for the operation of the project itself would be over 356,000,000 kwh.

(2) *Holding that the Secretary's duty or responsibility was comparable to that of the Postmaster General*

In interpreting Section 5 of the Flood Control Act of 1944, the Court below held that, until the Government has entered upon the construction of a project, the Secretary "has no more duty or responsibility in this connection than has the Postmaster General" (V, 31).

By no stretch of the imagination can the Secretary's duties or responsibilities be compared to those of the Postmaster General. While the latter does have a responsibility, either by himself or through the General Services Administration, to provide electricity for the post offices which he operates, his interest is that of a retail consumer. Had he sought to intervene in this proceeding, it is doubtful that he could have shown either that his interest was substantial, or that an order granting a license to VEPCO would substantially and adversely affect that interest.

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[38] This fact was brought to the attention of the court below, at the first opportunity presented, in the petition for rehearing (V, 50).

The Secretary of the Interior is not appearing here as a consumer of electricity for the establishments under his jurisdiction. His interests, duties and responsibilities are of great magnitude. They are not limited to individual projects or units of projects. He is charged with a function in which all parts are interrelated and which embraces all Government reservoir projects, except those under the jurisdiction of the Tennessee Valley Authority.

He markets power generated at Government projects through four main agencies: The Bureau of Reclamation, Bonneville Power Administration, Southwestern Power Administration, and Southeastern Power Administration. During the fiscal year 1951 the Secretary, through these agencies, disposed of about 25 billion kwh. of electric energy at a gross revenue of over $67,000,000.[39]

Even this is by no means an adequate appraisal of the magnitude of the Secretary's interest in the disposition of power, for there are now additional projects under construction; there are projects for which appropriations have been authorized, but construction of which has not yet begun; and there are projects which are included

[39] There are also projects operated, and power therefrom is marketed, by the Bureau of Indian Affairs; the National Park Service, and the Bureau of Mines, which are agencies of the Department of the Interior. These electric power operations, however, are on a much smaller scale.

[40] *Annual Report of the Secretary of the Interior (1951)*, p. 125.

in plans which Congress has "adopted" or "approved" for construction, but for which it has not yet authorized appropriations. In the flood control acts since 1936, Congress "adopted and authorized" a large number of projects in which are included 146 plants with power facilities.[41] The total capacity and annual energy output of Army projects constructed, under construction, and to be constructed are over 19,728,000 kw. and over 99,000,000,000 kwh. Including the capacity and energy of Reclamation projects (6,000,000 kw. and 30,000,000,000 kwh.),[42] the total power marketing responsibility of the Secretary, as of the present time, involves an ultimate total of about 26,000,000 kw. of capacity and 130,000,000,000 kwh. of energy per year.

(3) *Holding that the Secretary has no right, interest or responsibility with regard to any power project*

In interpreting Section 5 of the Flood Control Act of 1944, the court below held as follows (V, 31):

> It is perfectly clear that this statute confers no right or interest in any power project or its development, or any responsibility with regard thereto, upon the Secretary of the Interior.

[41] References to the statutes and congressional documents are included in the Appendix hereto, pp. 180–3.

[42] Not including projects constructed or to be constructed by water-users associations under the Reclamation laws or by the Army Engineers. *Annual Report of the Secretary of the Interior (1951)*, pp. 57–59.

After stating that the Secretary's responsibility related only to the disposition of "surplus" power, the court added (V, 31):

> * * * and no duty or responsibility with regard thereto can possibly arise until the government has authorized the project and entered upon its construction.

As applied to the task of disposing of power in wholesale quantities, on so vast a scale, and in accordance with the Federal Power Policy, such an approach is wholly unrealistic. Even the sales manager of an ordinary electric utility has an interest and responsibility with regard to the generating facilities of the utility. His duties and responsibilities with regard to such facilities antedate their construction.

In arriving at its conclusion, the court adopted two equally erroneous propositions urged by Respondents; namely, (a) that the Secretary's responsibility does not extend to making recommendations to Congress with regard to future power developments (Comm'n, p. 10), and (b) that the Secretary's function is limited to the disposition of power from constructed projects and does not extend to planning for the future (Comm'n p. 7).

(a) *Secretary's responsibility to advise Congress*

The Commission went so far as to say (I, 46):

> This function, carried in Section 5 of the Flood Control Act of 1944, has not been

extended by Congress to the submittal of recommendations by the Secretary of the Interior to it for the construction of projects serving only the purpose of providing the electric power.

This is implied also in the court's statements quoted above.

The error of law in this approach lies in the failure to interpret Section 5 with due regard (i) to other statutes and (ii) to the responsibilities inherent in the functions of the Secretary as the head of the Department of the Interior.

(i) By the Flood Control Act of March 1, 1917, 39 Stat. 950, 33 U. S. C. 701, which was the basic legislation providing for examinations and surveys relating to flood control, Congress required the Chief of Engineers to submit all reports on "preliminary examinations hereafter authorized, together with the report of the Board of Engineers for Rivers and Harbors thereon, and the *separate report of the representative of any other department*" [emphasis supplied], with his recommendation to the Secretary of War, and required the latter to submit the same to the House of Representatives (App. pp. 2–3, 56). In the light of this statute, it is difficult to see how it can be said that the Secretary's duty, interest or responsibility in these developments does not begin until the Government enters upon the construction of each particular project or project unit and does not extend to making recommen-

dations to Congress, especially in view of the enactment of Section 5 of the Flood Control Act of 1944.

To the contrary, the Secretary must be in a position to participate in investigations and surveys authorized by Congress for flood control purposes, and to cooperate with the Army Engineers so as to assure that the multiple-purpose projects will be designed to make feasible the marketing of the power to be generated in accordance with the Federal Power Policy. It is at this stage that he can best make certain that the disposition of power in accordance with the Federal Power Policy from projects ultimately constructed will not only be possible, but that it would be of greatest advantage to the people.

Respondents dismiss this important statutory provision with the statement (Comm'n, pp. 6–7):

> It was merely a procedural provision for coordination of the discharge of statutory responsibilities existing under other statutes, not the creation of new responsibilities.

We submit that there is no merit in this observation. The right and the obligation to participate in investigations and to make recommendations to Congress are not altered by characterizing an Act of Congress as "merely a procedural provision".

(ii) Let us assume, however, that the Act of March 1, 1917 is "merely a procedural provision"

and that as such may be disregarded. Even if the Secretary's duties and responsibilities were no more extensive or important than those of a sales manager of an ordinary electric utility, is it conceivable that his function would not extend to making recommendations with respect to the construction of generating facilities? Without any specific delegation of authority, a sales manager has a duty and responsibility to make recommendations as to future sources of electric energy. He is concerned with the timing of construction, with the amount of power that could be made available, with the size of the generating units planned to provide a given total capacity, with the scheduling of their installation to meet the expected market conditions, and with the cost of construction, for all these will affect his sales both in quantity and in price. All this is implied in his function as sales manager.

The same applies to the Secretary, but on a much larger scale. As a matter of sound business practice, it would be unthinkable for Congress to delegate to the Secretary the function of disposing of power from Army projects on so large a scale, in accordance with the standards and limitations prescribed in Section 5 of the Flood Control Act of 1944, and at the same time put him in the position of being confronted with an accomplished fact as to each project or project unit, without so much as to be able to make recom-

mendations as to the projects to be undertaken.

All this is wholly apart from the fact that, through an established procedure requiring review by the Bureau of the Budget, the Secretary makes recommendations to Congress on all matters affecting his Department, including the submission of bills to Congress on power developments. When legislation pertaining to power development is considered by the Public Works Committee of the House or the Senate, the chairman of the Committee requests the Secretary to submit his report, and the Secretary thus makes his recommendations to Congress. Likewise, on important matters pending before committees of Congress, the Secretary often appears as a witness and presents the views of the Department. A recent example of such appearance by the Secretary was in connection with the hearings on the St. Lawrence Seaway and Power Project before the Senate Committee on Foreign Relations and before the House Committee on Public Works.[43]

Furthermore, under Article II, Section 3 of the Constitution, the President is charged with the

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[43] See hearings on S. J. Res. 27 and 111, 82d Congress, 1st Session (St. Lawrence Seaway and Power Project), before the Senate Committee on Foreign Relations, pp. 58–80; also hearings on H. J. Res. 2, 3, 4, 15, 102, 122, 159, and H. R. 2536, 82d Congress, 1st Session, before the House Committee on Public Works, pp. 101–132, 163–200.

responsibility of recommending to Congress "such Measures as he shall judge necessary and expedient." The President acts through the heads of the various departments, and in matters pertaining to power developments, the Secretary of the Interior participates in the execution of this responsibility.

In view of the above, it cannot be said that the Secretary is not charged with any responsibility to make recommendations to Congress relating to the construction of hydroelectric projects.

(b) *Planning for future loads*

In its opinion the Commission went so far as to say (I, 46):

> * * * the only function assigned by Congress to the Secretary of the Interior in connection with the development of Roanoke River is to dispose of surplus power generated at the Buggs Island and Philpott flood control projects.

And further in its opinion the Commission said (I, 62–3):

> The Flood Control Act of 1944 confers authority upon the Secretary of the Interior to sell and deliver the surplus "power and energy" generated by constructed Government projects, * * *.
>
> The Flood Control Act of 1944 does not charge the Secretary of the Interior with the duty or confer authority to provide means to supply *all* power requirements of

public bodies and cooperatives, except insofar as it can be done from the surplus power available from constructed Army projects when such preference customers wish to purchase it and are able and willing to take it upon terms which meet the standards prescribed in Section 5 of the said Act; nor is authority found in Section 5 to arrange for or provide new sources of power for new preference customer loads to be developed in the future.

These propositions, also, are implied in the court's statements quoted above.

In marketing its power, the Government must always put itself in the best possible marketing position, if it is to accomplish its purpose of rendering service in accordance with the standards prescribed by Congress. The Secretary must not only plan his sales for the future, but must also enable the "preference customers" to plan their purchases years in advance in order to meet their expanding needs.

Even if the Secretary's task were no greater than that of a sales manager of an ordinary electric utility, both in the quantity of power to be disposed of and in the policies to be pursued, it would have been incorrect to characterize his duties and responsibilities in the manner quoted above. We cannot conceive of any business-like disposition of power in wholesale quantities which does not require taking into consideration the

future power requirements of customers. All power systems, whether public or private, must plan well in advance for the marketing of power, and, as has been indicated, these plans must take into account the nature and timing of the supply.

In practically all business enterprises, planning for the future is important. The business of supplying electric power differs from most other services in that estimates must be constantly made, not only to meet power requirements for years in the future, but also for each particular month in the year and for each hour in the day. For this reason it is important to have various types of reserves, over and above the maximum requirements, and it is important to have interconnections with other sources of supply to take care of breakdowns and other emergencies. These reserves and interconnections are necessary because of the ever-present need to meet future power requirements. All the facilities (generating facilities, transmission facilities, distribution facilities, operating and management personnel, corporate and financial facilities) must be geared to meet the demand for power at the moment and for the time it is needed. The service must fully respond to the flick of a switch anywhere throughout the system.

For this reason, the disposition of power in wholesale quantities is effected by means of long-term contracts. Purchasers of power (whether

public bodies, cooperatives, or privately owned companies) must take into account, not only present power requirements, but also the requirements of the future. In order to make power available to consumers at the time when a project is completed, the Secretary must enter into contracts several years prior thereto."[44]

In addition, Section 5 of the Flood Control Act of 1944 contemplates the construction or acquisition of transmission lines and related facilities. It is a matter of public record that it takes several years to make the necessary surveys and studies, to obtain appropriations, and to construct transmission lines for a sizable hydroelec-

[44] In our petition for writ of certiorari, we referred to the fact that, although the Buggs Island unit in the Congressionally-approved comprehensive plan for the Roanoke River Basin will not be ready for operation until the end of 1952, the evidence showed that in January 1949 VEPCO's representatives called on the Director of the Division of Power of the Department of the Interior to negotiate the purchase of Buggs Island power (I, 296). VEPCO in opposition pointed out that the contract finally negotiated had not yet been signed (VEPCO, p. 35). This is by no means a denial of the fact that the Secretary had an interest and responsibility with respect to Buggs Island power before the construction of this unit. Another example, which is now a matter of public record (Hearings before the Senate Subcommittee on Interior Department Appropriations for 1953, p. 62), is a contract now being negotiated by 12 public utilities with the Southwestern Power Administration for the purchase of power from *existing* projects, from *projects under construction*, and from projects *to be constructed* in the Southwestern area.

tric project. Such lines must be constructed by the time the first generating unit of a project is installed and is ready to operate. In planning transmission lines, one must consider not only the present and future capacity from a given project, but also interconnections with possible future sources of power. Transmission lines for the marketing of power can be effective only if they provide for a coordination of the projects in the river basin system. Then the projects in the river basin or in the region can be designed to supplement each other and thus to render the power most advantageous for disposition in accordance with the Federal Power Policy. These facts alone are incompatible with the proposition stated by the court below, i. e. that the Secretary has no duty or responsibility with respect to a project until the power therefrom is made available for distribution.

(4) *The Court below erred in minimizing the interests of the REA Association.*

It was error to minimize the interests of the cooperatives by saying that "their only possible interest is to purchase power which the Secretary may sell" (V, 31). Their interests are far more extensive, as has already been shown (pp. 62–6, *supra*). It would have been just as erroneous to have described the interests of Carolina and Appalachian as being merely to obtain power gen-

erated at VEPCO's proposed project if and when power were not available from VEPCO's other sources. Had this been their sole interest, the court should not have granted their petitions to intervene.

(5) *The Court below erred in minimizing the effect of the Commission's order.*

Just as the court minimized Petitioners' interest, so also it minimized the effect of the Commission's order thereon. It said (V, 30):

> The only grievance which the Secretary puts forward is that, if the power dam were built by the Government, he would have the right to sell the electric power produced; and the only grievance asserted by the cooperative association is that, if the Secretary should sell the power, it would have a preference in the right to purchase same.

This is hardly an accurate characterization of the gravamen shown by the Secretary and the REA Association. *One of the effects* of the Commission's order granting a license to VEPCO is to withdraw the Roanoke Rapids site from the Congressionally-approved comprehensive plan for Federal development; and this would mean that the Secretary would be unable to sell power from this unit, and the REA Association would be unable to purchase such power in accordance with Section 5 of the Flood Control Act of 1944. This

would have been a more accurate statement of the partial effect of the Commission's order. It is by no means the entire effect (see pp. 58–62, *supra*).

D. THE COURT BELOW ERRED IN HOLDING THAT PETITIONERS' INTERESTS AND THE EFFECT OF THE COMMISSION'S ORDER THEREON ARE CONTINGENT AND REMOTE

It is evident that the error of minimizing and limiting the Secretary's interest, both as to its scope and as to the time of its origin, was based upon Respondents' argument that this interest was "contingent and remote", on the theory that it would not attach until power from a constructed Federal project became available for disposition by the Secretary. Their argument (Comm'n, pp. 9, 10, 12, 22, 23, 25; VEPCO, pp. 4, 35) is that the Roanoke Rapids site has not been reserved for Federal construction, that it may never be so constructed, and that additional legislation and other steps must take place before the Secretary may be able to dispose of power from this project. Therefore, they contend that there is no adverse effect, if the project is licensed, and the sale of power therefrom by the Secretary is made impossible for the future.

(1) *Petitioners' interests are not contingent or remote*

It has already been demonstrated that the Secretary's interest does not come into being with each particular project as it is constructed. His interest came into being when he was first charged with responsibilities relating to the de-

velopment of land and water resources. Viewed from the narrower standpoint of the limited problem of marketing power from Army projects, his interest came into being with the enactment of Section 5 of the Flood Control Act of 1944. Apart from the fact that the Secretary's interest is not divisible into separate projects or units of projects, Respondents' contention, that his interest is contingent and remote (because the Roanoke Rapids site has not been reserved, and may never be constructed, as a Federal project), is erroneous for the following reasons:

(a) It overlooks the test provided by law for determining when the Government must be deemed to have entered upon a development (pp. 123–6, *infra*).

(b) It assumes that there is no stability of purpose in this type of Congressional legislation.[45]

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[45] It is interesting to note the basis upon which Respondents assert that the Roanoke Rapids unit in the Congressionally-approved comprehensive plan may never be constructed. Shortly after the hearing before the Examiner commenced, Colonel Gee of the Corps of Engineers appeared before the House Committee on Public Works, at hearings on H. R. 5472, 81st Congress, 1st Session, which later became the Flood Control Act of 1950. He urged that the Congressionally-approved plan should be modified by authorizing the construction of Smith Mountain, instead of Gaston and Roanoke Rapids, as the next step in the development. In the course of his testimony, of which more will be said later (see n. 51, p.111, *infra*), he was asked how many years would be required to complete the comprehensive plan, if the Corps of Engineers had the money. Instead of answering this ques-

When Congress "adopts" or "approves" a comprehensive river basin plan for Federal development, it must be assumed that such plan will be carried out at such time as Congress will appoint. The integrity of the law must be preserved. Until Congress, by law, withdraws the Roanoke Rapids site from the Congressionally-approved comprehensive plan, the 1944 Act must prevail.

(c) It assumes that the proper test of remoteness and contingency of the interest is whether additional steps may be interposed before that interest is either annulled or materially injured.

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tion, Colonel Gee replied that it would take about 4 years to complete the Smith Mountain unit. Congressman Pickett then asked whether it would take something in the neighborhood of 15 to 20 years to complete the comprehensive plan "if you just took them up in the course of an orderly procedure; is that right?" Colonel Gee's answer was that the comprehensive plan might never be completed, *if the demand did not arise for the power generated by the remaining projects in the over-all plan* (App. pp. 157–8). This colloquy was considered by the Examiner to be "pertinent" in arriving at his conclusion that the arguments in favor of Federal development were premised upon the *assumption*, "for which no basis can be found in the record", that the United States would, in fact, build Roanoke Rapids within some reasonably foreseeable time, if no Federal license were issued to a private or non-Federal applicant. The Examiner stated (III, 1081–2):

"The contrary appears to be the fact. The probability is that, so far as the United States is concerned, the power resources at Roanoke Rapids are destined to be undeveloped and unutilized for a long time to come."

The Examiner in effect imposed a rule of laches on Congress. Then, in anticipation of unreasonable delay by Congress, he deprived the United States of the Roanoke Rapids site.

Therefore, Respondents argue, that before the Secretary will be able to dispose of power from Roanoke Rapids, Congress will have to authorize appropriations for the construction of this project, it will have to appropriate funds for construction, the Army Engineers will have to construct the project, and (the court below added) the Secretary of the Army will have to certify that the power generated is not needed for the operation of the project itself[46] (pp. 74–6, *supra*).

[46] In our petition for writ of certiorari, we demonstrated that there was no merit in the court's statement that the Secretary has "in fact" no responsibility whatever with respect to the disposal of power produced by any project until the Secretary of the Army "certified" that in his opinion the power was not needed for the operation of the project. We stated that the amount of power available for distribution is known when the "*definite project report*" is issued and, that in the case of the Buggs Island project, that report was issued 7 years before the estimated time when the project will go into operation (Pet., pp. 12–14). Respondents (Comm'n, p. 6) took full advantage of our understatement by pointing out that no "*definite project report*" has been issued on the Roanoke Rapids unit. Perhaps we were wrong in thus understating our contention. The amount of power available from a proposed project is known when the preliminary examination is made. Given the proposed installed capacity, the head at the reservoir, and the natural flow conditions as recorded in the water supply papers of the United States Geological Survey, or the releases of water from an upstream project, the amount of power can be easily calculated. In the case of the Roanoke Rapids unit in the Congressionally-approved comprehensive plan, the amount of power stated in the survey report is 58,800 kw. and 357,700,000 kwh. (I, 154–5).

This is not a proper test for holding that either the interest or the effect of the Commission's order thereon is contingent or remote. In any case, no matter how substantial the interest or how great the effect thereon, it is possible to interpose such steps, and between any two of them it is possible to set up any number of intermediate steps. The fallacy at the basis of their argument is the assumption that the Secretary's interest has no continuity.[47] If one recognizes, as one must, that the Secretary has an interest in the development of public power generally and, in the case of flood control projects in particular, from the time investigations are authorized to be made, the entire argument as to the remoteness and contingency of his interest must fall.

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[47] This is a fallacy akin to the one lying at the basis of Zeno's paradox concerning Achilles and the tortoise, wherein Zeno demonstrated that in a race between Achilles (the fastest runner in Greece) and the tortoise (the slowest of the animals), the former could not catch the latter, no matter how great the handicap given: Suppose that Achilles ran 100 times as fast, and gave the tortoise a handicap of a mile; then, by the time Achilles runs one mile, the tortoise will have advanced 1/100th of a mile; by the time Achilles runs the 1/100th of a mile, the tortoise will have advanced 1/10,000th of a mile, etc. Thus Achilles will always approach the tortoise, but will never catch it. But Achilles does catch the tortoise, and the fallacy in Zero's paradox is that he assumes no continuity in the movement of the participants in the race, but disconnected movements from and to the points designated. Russell, B. *Principles of Mathematics*, Chapter XLII (1938 ed.), pp. 346–354.

(d) Respondents' argument (Comm'n p. 12), that the interests of the REA Association are further contingent on the ability and willingness of the Secretary to sell power to them, rests on the proposition that they derive their interest solely from the Secretary. If this were so, then their standing in court would depend on the Secretary's standing, and if it were held that the Secretary had no standing in court, then they too would have no standing.

The premise of the argument is erroneous, and so also is the conclusion. It is true that, to the extent that Section 5 of the Flood Control Act of 1944 vests discretionary powers in the Secretary, their ability to purchase power generated at these projects depends on the Secretary's discretion properly exercised. Their *right* to a preference in the purchase of power, however, is derived, not from the Secretary, but from the statute itself. Furthermore, they do have a right of preference in the purchase of Buggs Island power in accordance with the standards prescribed by law, and this right is adversely affected by the licensing of Roanoke Rapids to VEPCO. Therefore, even if it could be held that the Secretary had no standing, such holding would not affect the standing of the REA Association and its member cooperatives.

(2) *The adverse effect is not contingent or remote*

Inherent in Respondents' argument is the confusion between the interest and the effect of the Commission's order.

(a) The two are not co-extensive. Rarely is the effect as great as the interest. For a party to be "aggrieved", it is not necessary that his entire interest be wiped out. It is sufficient if it is substantially and adversely affected (pp. 16–17, *supra*).

(b) Nor are the interest and the effect thereon coterminous. Respondents say, in effect, that Petitioners' interests will not be affected until there is electric power and energy generated at a Federally constructed Roanoke Rapids project and it is available for distribution, and the Commission's order would make that distribution impossible. It is true that if the project site is licensed, there never will be a Federally constructed Roanoke Rapids project. But this only means that the issuance of the license has a devastating effect, not that the effect is conjectural, contingent or remote.

(c) Respondents' argument also begs the question. Petitioners contend that the Commission's order is invalid because, by Section 10 of the Flood Control Act of 1944, the Roanoke Rapids site has been reserved for Federal development and that the effect of this reservation is to withdraw this site from the licensing jurisdiction of

the Commission. For the purpose of determining whether Petitioners have standing in court, it must be presumed that this is so (pp. 70-2, *supra*).

In this respect, the case at bar differs from the cases on which Respondents rely (Comm'n p. 10), cited by the court below (p. 15, *supra*). For example, in *U. S. Sugar Refiners Ass'n* v. *McNutt*, 138 F. (2d) 116, the petitioners attacked an order of the Food and Drug Administration authorizing canners to use dextrose, or corn syrup, or both, in combination with sugar, without being required so to state on the labels. Assuming the order to be invalid for the precise reasons assigned by them, the petitioners' interest was, nevertheless, speculative and remote. Not so in the case at bar. If it is assumed as Petitioners contend that, by Section 10 of the Flood Control Act of 1944, Congress did reserve the Roanoke Rapids site for development by the United States, and did withdraw it from the licensing jurisdiction of the Commission, then the Petitioners' interests are immediately and directly affected by the Commission's order.

(d) Finally, Respondents' argument is erroneous in fact. There is nothing contingent or remote in the effect of the Commission's order. Petitioners' interests were adversely affected at the moment when the Commission issued a license for Roanoke Rapids, and this adverse effect will continue until the order is set aside. It is suffi-

cient to point out that at this time the Secretary must take into consideration the fact that Buggs Island power rates will be forever greater than would obtain if Roanoke Rapids remained within the Congressionally-approved comprehensive plan, and the REA Association must pay such higher rates. Since contracts must be entered into with due consideration for future power requirements, the Secretary must now plan on a lesser amount of firm power than would be available if Buggs Island and Roanoke Rapids were coordinated under common ownership and control. Of course, as has already been indicated (pp. 58–62, *supra*), this is not the entire effect of the Commission's order.

(e) Nor can it be said that the effect of the order is unsubstantial. Where an applicant for a license seeks to strike at the foundation of public power development, and to disrupt a Congressionally-approved comprehensive river basin plan, the entire adverse effect of the Commission's order granting such a license is immeasurably great (pp. 60–62, *supra*). One phase of this effect, measurable in money, is the surrender of power benefits over the 50-year period of the license. Whether measured in terms of gross power benefits (approximately $135,000,000), or in terms of net power benefits (in excess of $75,000,000), the effect is substantial enough.

Whatever may be one's major premise—whether one favors public or private development,

whether one likes or dislikes the cooperative movement, whether one agrees or disagrees with the Federal Power Policy and its application, including the preference given to public bodies and cooperatives—one cannot disregard the fact that Petitioners' interests are real and substantial, as is also the effect of the Commission's order.

Part Two. Reservation of Roanoke Rapids for Federal Development

Petitioners maintain that the Commission was without jurisdiction to issue a license for Roanoke Rapids, because this power site has been reserved by Act of Congress for Federal development as part of the comprehensive plan for the development of the Roanoke River Basin.

We propose to demonstrate that (I) in the light of the facts, as to which there should be no dispute, and (II) the test laid down by Congress, (III) it is clear, without any resort to interpretation, that the Government has entered upon this development, and (IV) that any reasonable interpretation of the applicable statutes leads to the same conclusion. Since (V) the Congressionally-approved comprehensive plan has not been so modified as to permit non-Federal development of its constituent units, we submit (VI) that the Roanoke Rapids site has been withdrawn from the licensing authority of the Commission.

I. THE FACTS

We propose to set forth (A) the facts as to which there can be no dispute, and then (B) the conclusions or inferences which flow therefrom.

A. INDISPUTABLE FACTS

The following are the basic facts as to which there should be no dispute:

1. In 1929, VEPCO, through one of its affiliates, filed an application with the Commission for a license to construct a project at Roanoke Rapids. This application, for Project No. 916 (see Exhibits 88 and 89, R. 4189, 4197), was for a project having an initial installed capacity of 25,000 kw. and an ultimate installed capacity of about 41,000 kw., the latter contemplating that a project at Gaston would also be in operation. The power available 90% of the time from the then proposed project was to be 5,514 kw.

2. During the pendency of this application, the Army Engineers were working on their "308 report" on the Roanoke River in Virginia and North Carolina. They outlined a plan for the comprehensive development of the stream, consisting of 17 project units but arrived at the conclusion that this development would not be economically feasible and in 1934 they finally submitted their report (House Document 65, 74th Congress, 1st Session) recommending that the

Federal Government should not participate in the improvements "at this time" (App. p. 66).

3. The application for a license for Project No. 916 at Roanoke Rapids was withdrawn on January 31, 1935.

4. In Section 7 of the Flood Control Act of 1936 (App. pp. 9–10), Congress directed the Secretary of War "to continue surveys, studies and reports" at various localities where "according to the surveys and estimates already made, opportunities appear to exist for useful flood-control operations with economical development of hydroelectric power". Among the localities specified were "reservoirs in Roanoke and Tar Rivers, North Carolina". In Section 6 of the Flood Control Act of 1938 (App. pp. 14–15), Congress directed the Secretary of War to make preliminary examinations and surveys at various localities, including "Smith River and its tributaries, Virginia and North Carolina". In the same Acts, Congress included the usual provision that

> the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law.

5. In 1940 there occurred a destructive flood on the Roanoke River, and a group of citizens in

North Carolina organized a "Roanoke River Flood Control Committee" to make representations to Congress concerning the necessity of constructing flood control works in this area (R. 59–60). As a result of the activities of this group, on August 28, 1940, the House Committee on Flood Control adopted a resolution requesting the Board of Engineers for Rivers and Harbors to review the previous report on the Roanoke River (House Document 65) with the view to determining "whether any improvements in the interests of flood control and allied purposes would be advisable at this time". A similar resolution was adopted by the House Committee on Rivers and Harbors on January 26, 1942 (Exhibit 1, p. 12, R. 3552).

6. Pursuant to the directives in the 1936 and 1938 Flood Control Acts, and to the requests of these Congressional committees, the Corps of Engineers embarked upon a study and investigation, and the Chief of Engineers submitted a report thereon known as House Document 650, 78th Congress, 2d Session (Exhibit 1, R. 3533 *et seq.*, I, 135–178b).

7. House Document 650 includes the reports of the District Engineer, the Division Engineer, the Board of Engineers for Rivers and Harbors, and the Chief of Engineers.

(a) The District Engineer in charge of the investigations recommended a comprehensive plan of development, consisting of 11 dams and

reservoirs, of which 8 were to be constructed on the Roanoke River, 2 on the Smith River, and one on the Dan River. Of the 11 project units, two (Randolph and Schoolfield) were found to be economically infeasible, with benefit cost ratios of 0.96 and 0.84, respectively; the benefit cost ratios of three units (Smith Mountain, Taber and Stuart) were so close to 1 (being 1.04, 1.08 and 1.05, respectively) that any changes in prices might render them infeasible; the project as a whole, i. e., the comprehensive plan, had a feasibility ratio of 1.47 (I, 158–9), largely because of Gaston and Roanoke Rapids, which had feasibility ratios of 2.32 and 2.60, respectively. The District Engineer recommended that the plan be carried out at an estimated cost of $124,000,000 [48] in a given sequence, with the Buggs Island unit on the Roanoke River and the Philpott unit on the Smith River as the initial step in the development, to be followed by the construction of the

[48] That the plan was to be carried out by the United States with Federal funds flowed by necessary implication from the District Engineer's estimate that the cost of the plan would be $124,000,000 and that the annual charges for operation and maintenance would be $657,800. The annual charges include, among other things, interest at 3% of the estimated investment. This is a computation based on Federal financing. On the other hand, "water power value", which is the cost of equivalent steam power under private financing, includes a rate of 6% on the investment (I, 161–163).

dams and reservoirs at Gaston, Roanoke Rapids and Smith Mountain as the next steps in the development (I, 150–178).

(b) On June 22, 1943, the Division Engineer endorsed the recommendation of the District Engineer. He approved not only the physical structures of the various project units but also the comprehensive plan *as a single project* to be undertaken "at an estimated total cost *to the United States* of $124,000,000" (I, 178a).

(c) The report of the District Engineer and the endorsement thereof by the Division Engineer were reviewed by the Board of Engineers for Rivers and Harbors. This Board approved the comprehensive plan of development and recommended its adoption after having found as follows (I, 148):

> *The comprehensive plan of improvement,* consisting of 11 developments for hydroelectric power, flood control, navigation, and other uses, *provides* the best plan for the development of the water resources of the Roanoke River Basin. [Emphasis of the singular supplied.]

The Board recommended that the entire plan be adopted, stating that "the estimated ***Federal*** construction cost, including transmission facilities, is $124,000,000". It recommended that the improvement be undertaken on a step-by-step basis, with Buggs Island and Philpott "as the initial

step", and that the other units of the plan be constructed progressively at such rate as future developments may indicate desirable (I, 150).

(d) On May 22, 1944, the Chief of Engineers transmitted his report to the Committee on Flood Control of the House of Representatives, setting forth his findings and recommendations (I, 135–138). After stating that the Board of Engineers for Rivers and Harbors had concurred with the District and Division Engineers and had found that the comprehensive plan, consisting of 11 developments for hydroelectric power, flood control, navigation and other uses, was economically justified and provided the best plan for the development of the water resources of the Roanoke River Basin, the Chief of Engineers himself found: "The comprehensive plan as recommended by the Board provides for optimum development of the water resources of the basin". He also found that "to safeguard the interests of navigation and flood control, the dams and power facilities should be constructed, operated and maintained under the direction of the Secretary of War and supervision of the Chief of Engineers". He then stated as follows (I, 137–8):

> I accordingly recommend that *the general plan of development* outlined in the report of the district engineer *be adopted* as the basis for improvement, *step by step*, of Roanoke River and tributaries for flood control, navigation, and other purposes,

> and that the Buggs Island and Philpott projects be authorized for construction as the *initial step,* generally in accordance with the plans of the district engineer and my comments herein and with modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, at an estimated cost of $36,140,000 for construction and $164,100 annually for operation and maintenance. [Emphasis supplied]

Thus the Chief of Engineers recommended that the entire river basin plan as a whole be undertaken on a step-by-step basis by the United States.

8. By the time H. Doc. 650 was submitted to Congress, the House hearings on H. R. 4485, 78th Congress, 2d Session, had closed. The development of the Roanoke River Basin was therefore introduced as an amendment to the bill in the Senate. At the hearing on the bill before the Senate Committee on Commerce, Colonel Goethals described the plan of improvement and recommended its approval and the authorization of Buggs Island and Philpott in the amount stated. Then the following colloquy took place between him and the Chairman of the Committee[49] (App. p. 105–6):

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[49] Since quotations of parts of statements, with emphasis on some words or phrases, may be open to the charge that the matter is quoted out of context, or that undue emphasis is given to some parts, rather than to others, we have reproduced in the Appendix, pp. 102–7, Colonel Goethal's entire testimony on the Roanoke River.

Senator OVERTON. Are those the only two reservoirs that are recommended to be authorized *in this bill?*

Colonel GOETHALS. Those are the only two recommended to be authorized *in this bill.* The report recommends that Congress *approve the general plan of development,* but *at this time* authorize only those two reservoirs *in the amounts stated.*

* * * * *

Senator OVERTON. What is the estimated cost of the over-all plan?

Colonel GOETHALS. The over-all estimated cost for all 11 projects is $124,000,000.

Senator OVERTON. Will there be any levee construction?

* * * * *

Colonel GOETHALS. No; purely a reservoir proposition. Local protection works of course have been provided in various sections by local interests but when I answered your question I meant *Federal steps* in that respect.

Senator OVERTON. Yes; my question was confined purely to the *Federal works.* [Emphasis supplied.]

Thus it was the understanding of both the spokesman for the Army and the Chairman of the Senate Committee that the entire river basin development was intended as a Federal undertaking. There was nothing in the Senate Report (No. 1030, 78th Congress, 2d Session) that could

be interpreted as transmitting any different idea to the Senate.

9. On December 22, 1944, the President approved H. R. 4485, 78th Congress, 2d Session. Section 10 of this Act consists of over 35 paragraphs, of which the first is an introductory paragraph, "adopting and authorizing" works of improvement consisting of reservoir projects or river basin developments described in the subsequent paragraphs. One of these paragraphs is entitled "Roanoke River Basin". In the introductory paragraph of Section 10, Congress provided for the following:

(a) It *adopted and authorized* a large number of works of improvement for the benefit of navigation, flood control, and other purposes in the interest of National security and with a view toward providing an adequate reservoir of useful *public works* for the post-war construction program.

(b) These works of improvement, enumerated in the subsequent paragraphs, were *to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers,* in accordance with the plans in the respective reports and subject to the conditions set forth therein.

(c) The Department of the Army was authorized to prepare the necessary plans and specifications and to do the preliminary work on proj-

ects *authorized in the act to be constructed*, with funds appropriated or to be appropriated for flood control, so as to be ready for the rapid inauguration of a post-war construction program.

(d) After the then critical situation with respect to materials, equipment and manpower no longer existed, and in any event, not later than immediately following the cessation of hostilities in World War II, *the projects therein enumerated* (not merely those authorized to be constructed) were to be initiated as expeditiously and prosecuted as vigorously as might be consistent with *budgetary requirements.*

Among the public works thus "adopted and authorized" was the comprehensive plan for the development of the Roanoke River Basin. This provision reads as follows:

> The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

10. After the enactment of the Flood Control Act of 1944, Congress appropriated "planning money" for Buggs Island and Philpott, and on February 1, 1946, the Army Engineers submitted their "Definite Project Report on Buggs Island Reservoir". This report was approved by the Chief of Engineers on May 20, 1946. In this "Definite Project Report" it is shown that Buggs Island was enlarged both in reservoir capacity and in the installed power capacity. Congress then appropriated funds for the construction of this project unit, which is to have an ultimate installed capacity of 204,000 kw. and a controlled reservoir capacity of over 2,500,000 acre-feet. The total estimated cost of this project, due to increases in prices and changes in specification, is over $78,000,000, and the project is expected to be ready for operation before the end of 1952.

11. Despite the enactment of the Flood Control Act of 1944 and the authorization of construction of Buggs Island, VEPCO opposed Federal construction of this unit (see pp. 48–9, *supra*). Finally, it filed its application for a license to contruct a project at Roanoke Rapids with an installed capacity of 91,000 kw., and announced that it would also file an application for the construction of a project at Gaston.[50]

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[50] More recently it did file an application for Gaston. 16 F. R. 10613.

12. The hearing on the application for Roanoke Rapids commenced before the Examiner on May 12, 1949. On May 16, 1949, Colonel Gee, of the Corps of Engineers, appeared before the House Committee on Public Works at the hearing on H. R. 5472, 81st Congress, 1st Session, and recommended the authorization of the Hartwell unit on the Savannah River (App. pp. 127–142). On the next day (May 17), he proposed a change in the order of construction of the units comprising the comprehensive plan for the development of the Roanoke River Basin recommended by the Chief of Engineers in H. Doc. 650 and approved by Congress in the Flood Control Act of 1944.[51] He recommended the authorization of Smith Mountain as the next step in the development, instead of Gaston and Roanoke Rapids, for the reason, stated by him, that an application for a license to construct Roanoke Rapids was filed by a private power company, and that another application would be filed for Gaston (App. pp. 147–8).

13. The House Committee on Public Works adopted the recommendation that appropriations be authorized for the construction of the Hartwell Project, and provision therefor was made in the Flood Control Act of 1950 (App. p. 32). The Committee took no action on Colonel Gee's recom-

[51] For the reasons stated in note 49, *supra*, we are reproducing the testimony of Colonel Gee in full in the Appendix hereto, pp. 127–179.

mendation that the comprehensive plan for the development of the Roanoke River Basin, recommended by the Chief of Engineers in H. Doc. 650, should be so modified that Smith Mountain, rather than Gaston and Roanoke Rapids, would constitute the next step in the development.

B. INFERENCES OR CONCLUSIONS OF FACT

From the above, we submit, the following inferences or conclusions of fact must be drawn: (1) that the Chief of Engineers had recommended the comprehensive plan of development as a single Federal undertaking, and (2) that the Roanoke Rapids site is an asset of great potential value, deriving its value mainly from the Government's investment in Buggs Island.

(1) *Recommendation of a Federal undertaking*

Whether the Chief of Engineers recommended a plan in which the 11 project units were to constitute Federal works, or whether he recommended that some of the units should be constructed by the Federal Government while the others might be constructed by non-Federal interests, is a question of fact, and the best evidence of this fact is the report itself.

The report of the Chief of Engineers shows that he recommended a Federal development. That there was no mistake about adoption or approval of the plan as a Federal development is best evidenced by the testimony of Colonel Goethals. Even the later testimony of Colonel Gee is evi-

dence *of the fact*, as distinguished from *his wishes*, that the plan recommended in 1944 and "adopted" or "approved" by Congress was a plan for a Federal development of the Roanoke River Basin consisting of 11 project units, one of which was Roanoke Rapids. This is brought out by the following colloquy between the Chairman of the Committee and Colonel Gee, in which the latter explained that his recommendation was presented to the committee that morning (May 17, 1949) as an amendment to the recommendation of the Chief of Engineers which was approved by Congress in 1944 (App. p. 177):

> The CHAIRMAN. All right, we have no recommendation from the Chief of Engineers in this report [H. Doc. 650] that Smith Mountain should be the No. 2 unit.
>
> Colonel GEE. No sir. However, you have our recommendation as of this morning, that in view of the fact that a private utility company is now seeking to build the Roanoke Rapids Dam, and we believe a similar application will be filed on the Gaston site, that it is our feeling the Federal Government should not attempt to compete and build these straight-power projects.
>
> The CHAIRMAN. But the fact of the matter is there has been no modification of this report, and that is the statement that you make to the committee in the light of subsequent developments.
>
> Colonel GEE. Yes, sir.

From this it is evident that the Chief of Engineers recommended a Federal development, but that five years after the plan was adopted or approved, a different plan was recommended which, if adopted, would permit non-Federal construction of some of the project units in that plan.

(a) *The Examiner erred in finding that the recommendation of the Corps of Engineers did not contemplate a Federal development*

It would seem that the finding of the Chief of Engineers quoted by the Examiner in his recommended decision (III, 1051–2), to the effect that "the dams and power facilities should be constructed, operated and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers", was itself sufficient to establish that the plan recommended was to be a Federal undertaking in its entirety. The Examiner, however, arrived at a different conclusion, but not by an analysis of what the Chief of Engineers had actually recommended.

(i) Instead of making findings of basic facts as to what constituted the general plan for the comprehensive development of the Roanoke River Basin as recommended by the Army Engineers, the Examiner noted that at the hearing before the House Committee on Public Works on H. R. 5472, 81st Congress, 1st Session, General Pick referred to the recent report on the Columbia River Basin as a revised "308 report", and that this report

had been submitted at the request of two committees of Congress. In the course of that hearing, General Pick was asked whether this report on the Columbia River Basin would interfere with legislation in Congress for the establishment of a Columbia Valley Authority, and he answered that this engineering plan could be carried out by any administrative setup that might be put in charge of it. The Examiner treated this statement as meaning that this was merely a factual report for a comprehensive plan for a large river basin system (III, pp. 1065–6).

(ii) The Examiner noted that H. Doc. 650 was also submitted in response to resolutions of two committees of Congress (III, 1051). He failed to mention that H. Doc. 650 was submitted in response to the provisions in the Flood Control Acts of 1936 and 1938, authorizing preliminary investigations and surveys, but made it appear, instead, that the resolutions of the Congressional committees were authorized by the 1936 and 1938 Acts, which was not the case. He then concluded that H. Doc. 650 was also a revised "308 report" (III, 1074).

(iii) Since "308 reports" do not necessarily recommend Federal developments (App. p. 66) and H. Doc. 650 was considered by the Examiner as a revised "308 report", he concluded that the Army did not regard H. Doc. 650 as recommending that all the units therein should be constructed

by the Federal Government. Therefore he found that H. Doc. 650 did not so recommend (III, 1074–5).

Actually, House Document 650 was not a mere revision of the "308 report" on the Roanoke River (H. Doc. No. 65, 74th Congress, 1st Session). In the "308 report", the plan of development consisted of 17 project units; here the Army Engineers recommended a plan of 11 project units. In the former report the plan was found to be economically infeasible; here the plan was found to be economically feasible, with a benefit-cost ratio of 1.47. In the former report it was recommended that the Federal Government should not participate in the improvements; in H. Doc. 650 it was recommended that the entire plan be carried out by the Government at a cost of $124,000,000.

(b) *The Commission erred in sustaining the Examiner*

Petitioners excepted to the Examiner's failure to find the facts on the basis of the evidence, and requested the Commission to make such findings as to the basic facts (App. pp. 219–23). The Commission, however, declined to make such findings, but *sub silentio* adopted the Examiner's approach by referring to H. Doc. 650 as a revised "308 report" (I, 43).

(c) *The Court below erred in the same respect*

In the court below, Petitioners argued that the failure of the Commission to find the facts, which

(if determined in accordance with uncontradicted evidence in the record) would lead to a contrary result, constituted error, and that in such instances the court itself should make the findings.[52] The court did not find the facts based upon H. Doc. 650, but, like the Examiner, relied on the testimony of Colonel Gee for the proposition that the document did not contemplate Federal development of all the project units.

The court held further that the Board of Engineers placed the same interpretation on the Act; namely, that Section 10 of the Flood Control Act of 1944 did not adopt Federal development of the Roanoke River Basin (V, 37). This was error, because the only expression of the Board of Engineers in the record, with reference to the comprehensive plan, is that found in H. Doc. 650, from which we have already quoted (pp. 104–5, *supra*).

At the same hearing at which Colonel Gee had testified (1949) the Chief of Engineers himself had testified concerning the National flood-control program, saying that it embraced about a thousand projects (App. p. 110). Included in this number were all of the 11 projects in the comprehensive plan for the development of the Roanoke River Basin. He stated that the then estimated cost of the National flood-control program was

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[52] *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S. 568, 580.

over $7,500,000,000. Included in this sum was the figure of $124,000,000, which was the estimated cost of the Roanoke River Basin plan.

In these circumstances, it was error to conclude that the Army Engineers did not regard the comprehensive plan as a Federal development. Furthermore, even if this were the case, the observation was irrelevant, since the real question herein was not what the Army Engineers thought in 1949, but *what was the plan recommended by them to Congress in 1944.*

(2) *The value of Roanoke Rapids*

Roanoke Rapids is the farthest downstream of the 11 units of the comprehensive plan, with an installed capacity of 58,800 kw. and a reservoir capacity of 7,100 acre-feet. Upstream from Roanoke Rapids and below Buggs Island is the Gaston unit, with an installed capacity of 54,000 kw. and a reservoir capacity of 39,000 acre-feet (I, 154, 158). Buggs Island, as it is now being constructed, has an ultimate installed capacity of 204,000 kw. and a controlled reservoir capacity of over 2,500,000 acre-feet (the total volume being 3,392,000 acre-feet). The power capacity of Roanoke Rapids and Gaston depends to a great extent on the storage and regulation of water in the Buggs Island Reservoir. From an engineering standpoint, it may truly be said that both Roanoke Rapids and Gaston, as well as the power plant at Buggs Island, are the powerhouses of the Buggs Island Reservoir, with small pondage in the lower plants aiding in the re-regulation of the regulated water flow.

The dependence of the Roanoke Rapids site on Buggs Island is illustrated by the fact that, when VEPCO applied for a license for Roanoke Rapids in 1929, the installed capacity of the then proposed project was to be 25,000 kw., whereas, with Buggs Island in operation, the installed capacity of VEPCO's proposed project is 91,000 kw.

The importance of Buggs Island to the downstream developments is brought out even in the testimony of Colonel Gee, who explained why an application was filed for Roanoke Rapids and another would be filed for Gaston. He said (App. p. 168):

> Those applications are being filed principally because the Buggs Island Dam is under construction. They are both below Buggs Island and the greatest benefit is derived at those sites from the waters stored in the Buggs Island Reservoir.

As to Smith Mountain, he stated that the benefits therefrom "would be very small as compared with the Buggs Island benefit at the Roanoke Rapids site".

True, the Commission found that, with or without Buggs Island in operation, the dependable capacity of VEPCO's proposed project would be 91,000 kw. (I, 57). But the Commission failed to find that, without Buggs Island, the 91,000 kw. would be dependable for 4 hours during the peak month of December, whereas, with Buggs Island in operation, this capacity would be dependable

for 288 hours in the same peak month of the year.[53]

True, also, the Commission found that Buggs Island would contribute only 70,000,000 kwh. to the average annual power output of VEPCO's project (4, 56). But it failed to find that this 70,000,000 kwh. would be on-peak energy and that in addition, Buggs Island would convert 24,000,000 kwh. from off-peak to on-peak energy at Roanoke Rapids, and that it is this on-peak energy which expands the dependable capacity from 4 to 288 hours in the peak month.[54]

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[53] This may be seen by comparison of VEPCO's Exhibits 61 (II, 597) and 74 (II, 569), showing the maximum dependable capacity for a typical week in the peak month of December.

[54] This is easily computed from VEPCO's Exhibits 15 and 28, as follows:

VEPCO's proposed project	On-peak (million kwh.)	Off-peak (million kwh.)	Total (million kwh.)
Exhibit 15 (hydro)—with Buggs Island	309	36	345
Exhibit 28 (hydro)—without Buggs Island	215	60	275
Difference	94	(24)	70

"*Off-peak energy*" is defined in the "*Glossary of Important Power and Rate Terms*", prepared under the supervision of the Federal Power Commission, as "electric energy supplied during periods of relatively low system demands as specified by the supplier". "*On-peak energy*" is defined therein as "electric energy supplied during periods of relatively high system demands as specified by the supplier". Since the 70,000,000 kwh. would come from storage in the Buggs Island Reservoir, this energy would be not only "on-peak energy", but also "firm energy", and therefore would have the highest value of any type of energy. To this type are allocated all capital charges and taxes and a proportionate part of operation and maintenance.

While Petitioners claimed that the contribution of Buggs Island to VEPCO's proposed project would be about $1,955,000 per year (II, 751–752), and that the headwater benefit payments should be not less than $690,000, the Commission concluded that the contribution of Buggs Island would be only $250,000 per year [55] (I, 56). Nevertheless, even on the basis of the Commission's determinations, the contribution of Buggs Island to VEPCO's proposed project is very substantial, and it illustrates the importance of Buggs Island to the downstream developments.

The real question is: What benefit would the *United States* derive at Roanoke Rapids because of its investment at Buggs Island? On the basis of 1941 estimates, the net power benefits of the

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According to its own evidence, VEPCO paid on the average of 9.8 mills per kwh. for power (presumably on-peak) purchased from the Braddock Light and Power Company (II, 1010). On this basis, the 70,000,000 kwh. and the conversion of 24,000,000 kwh. from off-peak to on-peak power would have a value in excess of $700,000, not $250,000 as found by the Commission (I, 56).

The Commission's statement, that this energy "would cost the Applicant about $250,000 if obtained from a steam plant", is not supported by any evidence and is contrary to VEPCO's Exhibits 15 and 28 (II, 582–83). These show that the average cost of steam energy (both on-peak and off-peak combined) is 10.1 mills per kwh. One need not be an "expert" to see that on this basis, also, the energy contributed by Buggs Island would have a value in excess of $700,000 per year. One need only know elementary arithmetic. (Compare: The court's treatment of this subject in its opinion (V, 43) and our comment thereon in our petition for rehearing (V, 63)).

[55] This was "plain error." *Kessler* v. *Strecker*, 307 U. S. 22, 34.

Roanoke Rapids unit would be in excess of $900,000 per year, and on the basis of the 1948 estimates, the net power benefits would be in excess of $1,500,000 per year (I, 224). A large part of these net power benefits are the fruits of the Government's investment at Buggs Island. As the President's Water Resources Policy Commission said, with reference to VEPCO's application:[56]

> Issuance of such licenses to private power interests would have far-reaching effects upon Federal water resources programs, and more especially upon power policy, an important factor in such programs. Power values created by Federal investment in multiple-purpose programs would be utilized for private profit, instead of bringing about reductions in electric rates and expanded use of electricity.

The significant fact in this quotation is that "power values created by Federal investment" would be surrendered to private power companies.

The Examiner took cognizance of Petitioners' contention that power assets of great proportions would thus be surrendered, but dismissed the proposition with the assertion that the Government would be entitled to headwater benefit payments (III, 1075). In this connection the Examiner refused to find *the facts* as to the surrender of the fruits of the Government's investment in the upstream development. Petitioners excepted to his failure to find the facts and re-

[56] *Report of the President's Water Resources Policy Commission*, Volume I, p. 238.

quested the Commission to do so (App. pp. 223–4). The Commission also failed to find the facts. The court below found that this would involve no surrender of public assets to anyone (V, 46). Of this more will be said later (pp. 180–4, *infra*).

II. THE TEST OF A FEDERAL UNDERTAKING

We submit that (A) the statutory test, of whether the Government has entered upon an improvement, is whether the improvement has been "adopted by law" and (B) that the court below erred in failing to apply this test.

A. THE STATUTORY TEST

The court below said (V, 33):

> We agree with petitioners that where Congress *takes over a project* and *authorizes its construction* by the United States, the effect is to preclude the Commission's granting a license for its construction by a private corporation. [Emphasis supplied.]

Petitioners' contention, however, is not as stated by the court. Our contention is that when Congress takes over a project, the same result obtains *before* there is any "authorization of construction." The question is: *When does Congress take over a project?*

In flood control legislation which follows the pattern of the river and harbor acts (App. pp. 50–4), the following steps usually take place in chronological order:

(1) Congress authorizes and directs the Secretary of the Army to make surveys and investigations at specified streams or localities, but provides that the Government shall not be deemed to have entered upon any project for improvement until it is "adopted by law".

(2) The Army Engineers make the surveys authorized and submit their survey reports. If these reports recommend Federal development, they are published as Congressional documents.

(3) Congress by statute provides that improvements recommended in specified Congressional documents for Federal development are "adopted and authorized", i. e., that the improvements are adopted and appropriations are authorized [57] (See App. p. 52).

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[57] As in river and harbor acts (App. pp. 73–4), this section in omnibus flood control acts consists of an introductory paragraph applicable to all the improvements "adopted and authorized", followed by an enumeration of the improvements, each in a separate paragraph referring to the Congressional document in which the improvement is described and recommended. Where the improvement consists of a comprehensive river basin plan, Congress also states at times that the plan is "approved", but at other times that it is "authorized".

It is practically impossible to make a statistical analysis of the numerous ways in which projects (whether individual works, or combinations of works into "plans" or "comprehensive plans") are characterized. In the Flood Control Acts of 1936, 1938, 1941, 1944, 1946, and 1950, the works of improvement are 524 in number and are described in 185 paragraphs. However, there are many duplications, for the same "projects" or "plans" may appear in a number of Acts, as when they are modified or when additional appropriations are authorized.

(4) In the same statute Congress authorizes appropriations for construction either of entire projects recommended, or of parts thereof.[38]

(5) Congress appropriates "planning money" for completion of the plans of projects for which appropriations are authorized.

(6) The Army Engineers submit a "Definite Project Report" for each dam and reservoir.

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[38] The language in this respect varies, but the variations are not always significant.

In Section 5 of the Flood Control Act of 1936, a large number of projects were "adopted and authorized," and the subsequent paragraphs describing the various river basin plans merely carried the words "estimated construction cost $——."

In the analogous provision in the Flood Control Act of 1938 (Section 4), some of the river basin projects carried such phraseology as "there is hereby authorized $—— for the construction of," or "there is hereby authorized $—— for reservoirs and $—— for local flood protection works."

In the analogous provision in the Flood Control Act of 1941 (Section 3), there are such expressions as "there is hereby authorized $—— for initiation and partial accomplishment of the project." In some instances the plan of improvement "is approved and there is hereby authorized $—— for the construction of the project," meaning the entire plan.

In Section 10 of the Flood Control Act of 1944, where appropriations are authorized for specific units in an approved plan, the wording is at times like that appearing in the paragraph relating to the Roanoke River Basin, but there are other expressions like "in addition to previous authorizations there is hereby authorized to be appropriated the sum of $—— for the prosecution of the comprehensive plan * * *".

The common denominator of all these provisions is that appropriations are authorized for the purpose stated.

(7) Congress appropriates funds for the construction of such dam or reservoir.

(8) The Army Engineers then proceed with the construction.

(9) In subsequent acts, if it appears that the sums authorized to be appropriated will not be sufficient, additional sums are authorized to be appropriated and additional appropriations are made. At times additional appropriations are made without going through the formality of "authorizing" additional appropriations.

According to the statutory provisions authorizing examinations and surveys, the Government is deemed to have entered upon an improvement when it is "adopted by law", which is included in step (3) stated above.

B. FAILURE TO APPLY THE STATUTORY TEST

Neither (1) the Examiner, nor (2) the Commission, nor (3) the court below applied the statutory test as to when the Government is deemed to have entered upon a development.

(1) *The Examiner's test*

Although the Examiner referred to the "*adoption* of the general plan of development" (III, 1051), and therefore should have recognized that the Government had entered upon this project, he disposed of the introductory paragraph of Section 10 of the Flood Control Act by characterizing it as "a lengthy statement of purpose (from

which we cannot derive much aid in the determination of the jurisdictional question)". He turned to the paragraph entitled "Roanoke River Basin", where it was provided that the comprehensive plan recommended by the Chief of Engineers in H. Doc. 650 was "approved" and that Buggs Island and Philpott were "authorized" (III, 1052).

In the testimony before the House Committee on Public Works on H. R. 5472, already referred to, a discussion arose as to the meaning of the words "approved" and "authorized". Colonel Gee was asked to state "the difference between approving and authorizing a plan". He did not state the difference in meaning, but merely said (App. p. 137):

> We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan.

And the Chairman replied: "Nor do we."[59]

On the basis of this discussion, the Examiner concluded (III, 1073):

> This much is certain. The Corps of Engineers does not regard a project as "au-

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[59] If one reads the entire testimony on this point (App. pp. 136–9, 173, including the parts which were omitted by the Examiner, and later by the court below), it will be clear that the word "authorization" in this connection was used in the technical, legislative sense of "authorization of appropriations." When so used, Petitioners also agree that there is a difference in meaning between the words "approved" and "authorized" (pp. 144–6, 149–55, *infra*).

thorized" if it is only part of an "approved" comprehensive plan.

In other words, "authorization of appropriations", which is step (4) above, rather than "adoption by law", was used by the Examiner as the test for determining whether the Government has entered upon an improvement.

(2) *Commission's test*

The Commission, in sustaining the Examiner's recommendation, held: "Federal construction of the Roanoke Rapids unit in the comprehensive plan has not been authorized" (I, 69). Thus the Commission went one step further. Even "authorization of appropriations" is not sufficient to give the Army Engineers authority to commence construction. This they can do only when appropriations are made. In other words, the Commission's test is step (7) stated above (p. 126, *supra*), and it is the test which was provided in the river and harbor acts prior to July 3, 1930 (App. p. 50), but was superseded in the 1930 Act by step (3) stated above.

(3) *The test applied by the Court*

According to the court below, the Government does not enter upon an improvement until appropriations are authorized for construction, which is step (4) above, or until construction is begun, which is step (8) above, the latter being implied in the court's reference (V, 33) to *Sa-*

vannah River Electric Co. v. *F. P. C.*, 164 F. (2d) 408.

The court dismissed Petitioner's argument that the phrase "adopted by law" (in the section authorizing investigations) must be related to the phrase "adopted and authorized" (in the sections embarking upon the improvements) by saying (V, 38):

> It is a sufficient answer to this that the limitation inserted in the 1936 act was intended to preclude contentions that it had authorized projects for which it had authorized only preliminary surveys, not to enlarge the number of projects authorized by subsequent acts.

It is true, of course, that, since the jurisdiction over both investigations and improvements for flood control and allied purposes is vested in the Department of the Army, the *proviso* in the sections authorizing investigations also serves to indicate that jurisdiction over the improvements does not begin at the same time, but this does not explain when the Government *does* enter upon the improvements, i. e., when the improvement *is* "adopted by law".

Nor is the court's interpretation of the provision supported by history, despite its assertion (V, 38) that—

> When we look to the history of flood control legislation, * * * we think that there can be no question but that our interpretation is correct.

The history of flood control legislation shows that the meaning of this provision is the same as that which has obtained in the river and harbor acts since July 3, 1930. There the intent has been to provide that the Government should be deemed to enter upon an improvement before appropriations are either authorized or made, namely, when the works of improvement are "adopted" (App. pp. 52–3).

Like the Examiner, the court also referred to Colonel Gee's appearance before the House Committee on Public Works to urge the authorization of Smith Mountain as the next project unit in the comprehensive plan for the development of the Roanoke River Basin and the authorization of Hartwell, a project unit in the comprehensive plan for the development of the Savannah River, which plan was approved in Section 10 of the Flood Control Act of 1944, in the same manner as the comprehensive plan of the Roanoke River Basin (App. p. 23). The court considered it significant that, while the House Committee took no action on Colonel Gee's recommendation that Smith Mountain in the Roanoke River Basin should be authorized for construction, it (and later Congress) did adopt his recommendation with respect to Hartwell in the Savannah River Basin (App. p. 32). Upon this the court concluded (V, 36):

> If the general plans had been authorized for construction by the Flood Control Act

> of 1944, there would, of course, have been no reason for this legislation authorizing the Hartwell project, and no sense in rejecting the authorization of the Smith Mountain project.

Of course, Petitioners never argued that the plan was "authorized for construction" in the sense that nothing further had to be done to enable the Army Engineers to start digging. However, we submit that (a) there was good reason for the authorization of appropriations for Hartwell and (b) there was not only sense, but compelling reason, for rejecting Colonel Gee's recommendation with respect to Smith Mountain.

(a) There was good reason for authorizing Hartwell, because the Clark Hill project on the Savannah River is nearing completion, and Hartwell is the next step in the development of that comprehensive plan, as approved by Congress in Section 10 of the Flood Control Act of 1944 (App. p. 23).

(b) There was good sense in not authorizing Smith Mountain with the implication that Roanoke Rapids and Gaston would be taken over by private power companies, for the reason that this would disrupt the comprehensive plan approved as a Federal undertaking (see the statements of the Committee Chairman, App. pp. 177–8) and for the further reason that, as between Gaston and Roanoke Rapids on the one hand and Smith Mountain on the other, the former were economi-

cally far more feasible, as may be seen by the following data (based on 1941 estimates) in H. Doc. 650 (I, 158–9):

	Gaston	Roanoke Rapids	Smith Mountain
Installed capacity	54,000 kw.	58,800 kw.	33,000 kw.
Construction cost	$12,640,000	$11,970,000	$12,300,000
Cost per kw	$234	$204	$372
Annual charges	$901,200	$871,200	$583,800
Annual benefits	$1,393,600	$1,533,900	$443,000
Benefit-cost ratio	2.32	2.60	1.04

There was also compelling reason for rejecting Colonel Gee's recommendation. He advocated that "the Government should not compete" with VEPCO in the construction of Gaston and Roanoke Rapids, although this would disrupt the integrity of the Army plan (approved by Congress upon representation that it had a feasibility ratio of 1.47). He regarded the preference provision in Section 5 of the Flood Control Act of 1944 as a mere "general understanding among the power marketing group in the Interior Department", and stated that if he were Secretary of the Interior, he would sell the power to private companies at the bus bar (App. pp. 152, 171, 172–3, 177). In recommending that Smith Mountain be constructed at an estimated cost of $24,830,000, he did not know whether it would have a benefit-cost ratio of even 1.04, or whether the ratio would be even less than 1. (App. pp. 140, 149–50, 153–4, 169–70).

The Examiner stated that the propriety of this recommendation, "discussed in the same breath,

as it were, with this [VEPCO's] application, was not questioned by the members of the Committee", and that the proposed rearrangement of "the step-by-step order of the development originally set forth in the Congressionally-approved Army plan, did not appear to disturb anyone" (III, 1077). As we read the hearings, the Examiner's observation was far from correct. The Committee's Chairman appeared very much disturbed, when in one question he put his finger on the essence of river basin development, and then took Colonel Gee to task on his explanation that the Government would be compensated by headwater benefit payments under Section 10 (f) of the Federal Power Act (App. pp. 37–8, 177–9). As an arm of Congress whose function it is to protect the interests of the people, the Committee could not approve his recommendation.

It is this type of testimony, given in 1949, that the court below treated as evidence of the Congressional intent in 1944 (V, 36–38). It has been held that long continued or settled, contemporaneous, and practical interpretation of a statute by executive officers charged with its administration and enforcement constitutes a valuable aid in determining the meaning of a doubtful statute.[20] To

[20] *Edward's Lessee* v. *Darby*, 12 Wheat (25 U. S.) 206, 210; *Smiley* v. *Holm*, 285 U. S. 355, 369; *McLaren* v. *Fleischer*, 256 U. S. 477, 481; *United States* v. *Chicago, N. Shore & M. Railroad Company*, 288 U. S. 1, 13; *United States* v. *Shreveport Grain & Elevator Company*, 297 U. S. 77, 84.

give efficacy to this rule it must appear that the administrative interpretation has continued for a long period, has received wide acceptation, and was made at or near the time of the enactment of the statute. None of these qualifications is attributable to Colonel Gee's statements.

Quite a different statement was made by the Army Engineers when the paragraph entitled "Roanoke River Basin" in Section 10 of the Flood Control Act of 1944 was before the Senate Committee on Commerce. Then the representative of the Army Engineers referred to the entire plan as "Federal works", and the recommendation with regard to Buggs Island and Philpott was that their construction should be authorized "at this time" (App. p. 105). It was upon this statement to the Senate Committee that the "Roanoke River Basin" paragraph was inserted in the bill, and was thus passed by Congress. This testimony received no consideration from the court below.

Even where a proposed amendment comes before the Congress as a body, and is defeated, the legislative intent may not be construed as embracing the effect of the language rejected.[61] Here, Colonel Gee's proposed amendment to the Congressionally-approved comprehensive plan was not even reported out of the Committee. In these circumstances, the statements made by Colo-

[61] *Fox v. Standard Oil Company*, 294 U. S. 87, 96.

nel Gee cannot be regarded as an authoritative source of interpretation.

Nevertheless, upon these premises, the court below concluded (V, 36):

> Since the passage of the act [Flood Control Act of 1944], *Congress has twice taken action* which is *inconsistent* with the idea that projects not specifically authorized were *adopted* for construction because embraced in the general plans approved—once in *considering but refusing to authorize* the construction of the Smith Mountain project on the Roanoke River embraced in the comprehensive plan here under consideration, and again in *authorizing* the construction of the Hartwell project on the Savannah River. [Emphasis supplied.]

Of course, there was no "action taken by Congress" refusing to authorize Smith Mountain. The fact that the House Committee did not adopt Colonel Gee's suggestion did not constitute action by Congress, nor even action by the House. At most it can be said that there was inaction by the House Committee on Public Works, and that there remained a "non-authorization" of Smith Mountain. Yet, according to the court below, "Congress has taken action" by "considering but refusing to authorize the construction of the Smith Mountain Project".

Treating this matter in its true light, the court's statement reduces itself to the proposition

that both authorization and non-authorization of additional project units in a comprehensive plan are inconsistent with the idea that projects within the plan are adopted for construction. Such reasoning is valid only where there are no projects in Congressionally-approved plans.[62] We submit that it was error by such reasoning to avoid the consequences of the test laid down by Congress; namely, that the Government shall be deemed to enter upon a development when it is "adopted by law".

III. IT IS CLEAR, WITHOUT ANY NEED FOR STATUTORY INTERPRETATION, THAT THE GOVERNMENT HAS ENTERED UPON THE ENTIRE RIVER BASIN DEVELOPMENT

The test of whether a statute is clear and unambiguous is not whether no disputes may be raised as to its meaning, but whether a given result obtains irrespective of any interpretation which may be given to the statute.

Once it is established that, *as a matter of fact*, the Chief of Engineers recommended a plan for Federal development, and that, *as a matter of law*, the test laid down by the statute must be followed, the result is so clear and unambiguous that it is not necessary to resort to any statutory

[62] This is elementary logic. To say that A is inconsistent with B, and not-A is inconsistent with B, actually means that B is non-existent (See App. p. 185).

interpretation.[63] That the statute clearly and unambiguously adopts the comprehensive plan for the development of the Roanoke River Basin as a Federal undertaking may be demonstrated by applying either (A) the introductory paragraph of Section 10, or (B) the paragraph therein entitled "Roanoke River Basin".

A. APPLICATION OF THE INTRODUCTORY PARAGRAPH OF SECTION 10

Applying the introductory paragraph, the following propositions obtain:

(1) A survey report on the Roanoke River Basin was submitted and printed as H. Doc. 650, recommending a Federal river basin development.

(2) In Section 10 of the Flood Control Act of 1944, Congress provided:

> *That the following works of improvement* * * * are hereby *adopted and authorized* * * * *to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers* in accordance with the plans in the respective reports hereinafter designated and *subject to the conditions set forth therein.* [Emphasis supplied.]

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[63] *Hamilton* v. *Rathbone*, 175 U. S. 414, 421; *Van Camp and Sons* v. *American Can Company*, 278 U. S. 245, 253; *Caminetti* v. *United States*, 242 U. S. 470, 490; *United States* v. *Lexington Mill & E. Company*, 232 U. S. 399, 409; *Wilkinson* v. *Leland*, 2 Pet. (27 U. S.) 627, 662.

(3) Among "the following works of improvement" listed in that section is "the general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-Eighth Congress, second session".

(4) Therefore, the Government has entered upon the improvement of the Roanoke River Basin in accordance with the plan set forth in H. Doc. 650.

This result obtains whatever meaning may be ascribed to the words "adopted" or "authorized" or any other words and phrases in the statute.

B. APPLICATION OF THE PARAGRAPH ENTITLED "ROANOKE RIVER BASIN"

The same result obtains, even if one limits consideration, as the court below did, to the paragraph in Section 10 entitled "Roanoke River Basin".

(a) In H. Doc. 650, the Chief of Engineers, after stating his findings, recommended as follows: "I accordingly recommend that the general plan of development * * * *be adopted* * * *." [Emphasis supplied.]

(b) Congress acted favorably upon this recommendation without qualification. *It adopted the general plan recommended by the Chief of Engineers.*

(c) The plan was adopted *by Act of Congress;* it was "adopted by law".

(d) It follows, therefore, that the Government has thereby entered upon the project for the improvement of the Roanoke River Basin in accordance with the plan in H. Doc. 650.

Here again the result does not depend on any interpretation of the word "approved" or "authorized".

IV. INTERPRETATION OF THE STATUTES LEADS TO THE CONCLUSION THAT THE ENTIRE COMPREHENSIVE PLAN WAS ADOPTED AS "A SINGLE PACKAGE" FOR FEDERAL DEVELOPMENT

Assuming that the statute under consideration is not clear and unambiguous, and that one must resort to "interpretation" in order to ascertain its meaning and effect, we submit that a *proper application*[64] of the rules of statutory construction

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[64] We do not contend that statutory construction is a mechanical process of measuring an enactment by rigid rules. Interpretation does involve the use of judicial judgment and discretion, yet it does not admit of an arbitrary choice of one or another rule of interpretation, for adjudication is not a reflection of the arbitrary will of the adjudicator. Rules of interpretation constituting the judicial heritage of our jurisprudence have been evolved to play an important role in the ascertainment of the legislative intent, and they lend uniformity and stability to the body of statutory law. Since these rules deal with a variety of categories (e. g., with the primary and secondary sources of interpretation, with the relation of the statute under consideration to other statutes or to the general body of the law, or with the ends to be attained in terms of equity or public welfare), they often overlap and at times are in conflict with each other. They must therefore be balanced, in order to arrive at the true meaning and effect of the enactment. See *United States v. American Trucking Associations*, 310 U. S. 534, 542–4.

leads to the conclusion that, by Section 10 of the Flood Control Act of 1944, Congress adopted the comprehensive plan for the development of the Roanoke River Basin as a single Federal undertaking.

Since the purpose of interpretation is to ascertain the meaning of the legislation, and the words of the statute are the symbols of meaning and intent,[65] we shall first (A) demonstrate our position by analysis of the language of the statutory provisions involved, then we shall show (B) that the meaning thus attributed to the statutory language is consonant with the purpose of the statute, and finally (C) that our interpretation is otherwise in accord with the applicable rules of statutory construction.

A. MEANING OF THE STATUTORY LANGUAGE

In an analysis of the statutory language, consideration should be given to the words used in both (1) the provisions authorizing investigations and (2) the provisions adopting the improvements. It is a settled rule that the usual, ordinary and non-technical meanings of the words used must be adopted, where such meaning is conso-

[65] *United States* v. *American Trucking Associations*, 310 U. S. 534, 542; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 53.

nant with the purpose of the statute,[86] except where a technical meaning is obviously intended.

(1) *Provisions authorizing investigations*

The provisions authorizing preliminary examinations and surveys for flood control and other purposes also furnish the test as to when the Government enters upon a project for improvement. The proviso is in a negative form; to wit, that the Government shall *not* be deemed to have entered upon *any project for the improvement* of a waterway *until* it has been *adopted by law*.

(a) The word "project" in its common connotation, means a "plan", or a "design", or a "planned undertaking". A "project for the improvement of a waterway" means a planned undertaking for the improvement of the waterway. This phrase goes back in rivers and harbors legislation to 1892, when Congress for the first time made provision as to when the Government should be deemed to have entered upon a "project for the improvement of a waterway or harbor" (App. p. 50). A project in that connection could mean the repair of a pier, the excavation or dredging of a channel, or any other undertaking to improve the navigability of a stream or harbor. The word "project" in this connection is

[86] *U. S.* v. *First National Bank*, 234 U. S. 245, 258; *Old Colony Railway Company* v. *Commissioner of Internal Revenue*, 284 U. S. 552, 560; *Reinecke* v. *Smith*, 289 U. S. 172, 174–5.

not used as defined in Section 3 (11) of the Federal Power Act (App. p. 32); namely, a unit of development consisting of dams, reservoirs, powerhouses, primary transmission lines, *et cetera*. The word "project", as used in the section authorizing investigations for flood control, may include a project, as defined in the Federal Power Act, or it may include a series of such projects.[67] A comprehensive plan for the development of a river basin is, therefore, a project for the improvement of a waterway. As the Division Engineer stated in his endorsement of the plan proposed by the District Engineer, he recommended the adoption of "a *project* for comprehensive and orderly development of the water resources of Roanoke River"[68] [emphasis supplied] (I, 178b). However, the word "project" is also used in flood control acts in the sense of "project units".

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[67] Even within the definition of "project" in the Federal Power Act, several project units may constitute one project. See, for example, *In the Matter of Pacific Gas and Electric Co.*, 3 F. P. C. 730, 731, where the Commission speaks of *the entire project (Pits 3, 4, and 5 units)* as consisting of three dams and reservoirs. The situation presented there is the same as that presented by Buggs Island, Gaston and Roanoke Rapids which, in point of fact, constitute one project.

[68] This answers Respondents' argument (Comm'n, p. 17) that a "general plan" is not a work of improvement within the ordinarily and commonly understood meaning of these words.

(b) The word "until", in its usual sense, means "up to the time of". Fowler, in his *Modern Dictionary of English Usage*, says that the word means "throughout the interval between the starting point [the authorization of the investigation] and the goal [the adoption of the project for the improvement]". In directives, the word "until" is a word of limitation, and presupposes that when the condition following this word becomes operative, the precedent condition is removed.[69] In the provisions under consideration it means that, in the interval between the authorization of an investigation and the adoption of a project for improvement, the condition or status of the proposed improvement is that the Government has not entered upon it. With the adoption of the project, the Government is deemed to have entered upon it.

(c) The project for the improvement is to be deemed entered upon when it is "adopted by law". The word "adopted" means "taken or received as one's own, selected and taken or *approved*." (Webster's *New International Dictionary*.) Thus, when Congress authorized investigations to be made, it provided that the Government should not be deemed to have entered upon the improvements until the projects were selected and taken or approved in the form of a statutory

[69] *Bud Hoard Company* v. *Berg & Company*, 278 Pac. 273, 284; *In re Wiegand*, 27 F. Supp. 725, 729.

enactment or a regulation of equal dignity. By comparison with the earlier provisions in the river and harbor acts (App. p. 50), it also means that it is not necessary to wait until funds for construction are appropriated before the Government is deemed to have entered upon the improvements.

(2) *Provisions undertaking improvements*

When Congress passed the 1944 Act adopting the works of improvement, it meant that by this process the Government has entered upon the works set forth in Section 10 of the Act. This proposition is supported by the language of (a) the introductory paragraph of Section 10, and (b) the paragraph entitled "Roanoke River Basin", and (c) it is clear that the latter is not a limitation on the former.

(a) *Introductory paragraph of Section 10*

The introductory paragraph of Section 10 contains language which is replete with the meaning that the works adopted were to be undertaken by the Federal Government.

(i) The words "adopted and authorized" go back to the Rivers and Harbors Act of 1922 (App. pp. 51–2), where, as the chairman of the Committee reporting the bill explained, appropriations were authorized for carrying out the projects which were "adopted".

In view of the use of the word "authorized" in the subsequent paragraphs of this section, the

phrase "adopted and authorized" means that all of the projects (plans of development) are adopted and appropriations are authorized (for the project as a whole or for some specified or unspecified part thereof). It was "the plan that was adopted and authorized in the 1944 act", as Chairman Whittington told Colonel Gee (App. p. 138). Looking at the matter from the standpoint of the project units, rather than the projects themselves, the provision means that all of the units are adopted, but for only some are appropriations authorized. This is the result which obtains if the word "authorized" is used in the special legislative sense of authorization of appropriations.

If the word "authorized" is taken, not in its technical-legislative sense, but in its common connotation, the phrase "adopted and authorized" means that the works of improvement are taken by Congress as its own and "given legal sanction". Then, even if the criterion (adoption) laid down by Congress were to be disregarded, and another criterion (authorization) adopted by the court below were to be put in its place, the projects enumerated in Section 10 must be held to have been entered upon by the United States, because they have been not only "adopted", but also "authorized".

Respondents suggest a narrower construction (Comm'n, p. 18). They say that the words "adopted and authorized" mean that only

those projects or units are adopted which are authorized. Such interpretation must be held erroneous for the following reasons: *First,* because it is a narrow construction of a remedial statute (see pp. 174–6, *infra*), *second,* because that is not what the statute provides, and *third,* because it is incompatible with other language in the same provision.

While in the first proviso in the introductory paragraph of Section 10 the War Department was permitted, while the war was in progress, to expend funds on "necessary plans, specifications, and preliminary work * * * on any project authorized in this act to be constructed" in the second proviso Congress directed that after the war "the projects herein" (not merely those authorized in this act to be constructed) shall be initiated and prosecuted with such expedition and vigor as may be consistent with budgetary requirements. Obviously, Congress did not direct the Army Engineers so to proceed with those projects, unless they were adopted.

(ii) All the works of improvement enumerated in Section 10 were to be undertaken with a view to providing a reservoir of "public works". The term "public works" is customarily employed to designate works undertaken by the Government, as distinguished from "private works" which are undertaken by private enterprise.[70] In river and

[70] *Title Guaranty & Trust Company* v. *Crane Company*, 219 U. S. 24, 33; *United States* v. *Irwin*, 316 U. S. 23, 27–30.

harbor legislation, the phrase "public works" has been in use since 1871 [71] (See also App. p. 49) to describe improvements undertaken by the United States through the Army Engineers. More recently, since the enactment of Title II of the National Industrial Recovery Act of 1933 (48 Stat. 195, 201), the term "public works" became current in referring to works conducted either by the United States itself, or by others under a grant of public funds.

(iii) All the projects enumerated in Section 10 were to be prosecuted by the United States. This is evident from the express language in the introductory paragraph to the effect that these "public works" were adopted and authorized "to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated." [72] Public works for the benefit of navigation and the control of destructive flood waters have since 1798 been the task of the Army Engineers.[73] They construct such works for the United States, not for any private party.

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[71] Act of March 3, 1871, 16 Stat. 538.

[72] When a statute prescribes that a thing be done in some way, it implies also that it should not be done in any other way. *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289.

[73] The first Rivers and Harbors Act, 1 St. 546, which appropriated money for the repair of a pier at the mouth of the Kennebunk River in Maine.

The phrase "in accordance with the plans in the respective reports hereinafter designated" is also part of the pattern of river and harbor legislation, and constitutes a limitation on the manner in which the works of improvement shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers. Reference to H. Doc. 650 discloses no suggestion that the Roanoke River Basin project should be prosecuted by anyone other than the United States, hence it cannot be assumed that Congress intended otherwise.

(iv) The provision that the plans, specifications and preliminary work on the projects authorized to be constructed should be prosecuted "with funds from appropriations heretofore or hereafter made for flood control", and the provision that all the projects should be initiated and prosecuted with such expedition and vigor "as may be consistent with budgetary requirements", indicate sufficiently that the projects were intended to be constructed with funds of the United States, hence by and for the United States, and not by and for anyone else.

(b) The paragraph entitled "Roanoke River Basin"

Even if the introductory paragraph were disregarded, as it was disregarded by the Examiner, the Commission and the court below, and the test of whether the Government had entered upon the improvement of the Roanoke River Basin

were to be sought solely in the paragraph entitled "Roanoke River Basin", the conclusion is inescapable that the Government has entered upon the comprehensive plan. Here, too, the language used is significant.

(i) We have already shown that the word "adopted" means "approved" (p. 143, *supra*). When Congress approved the plan recommended by the Chief of Engineers, it adopted it as its own. Since the adoption was in the form of an enactment, the plan was "adopted by law".

(ii) If the word "authorized", as used in connection with Buggs Island and Philpott, is taken in its technical legislative sense of "authorization of appropriations", then no problem is presented, for there is no conflict between setting aside sums of money to be used for Buggs Island and Philpott and undertaking an entire river basin improvement.

(iii) The court below regarded the word "authorized" as relating to the "construction," rather than to the "funds to be appropriated." In this view, the words "approved" and "authorized" have a common meaning. When a plan of development is recommended for construction and it is approved, it means that it is approved for construction, that official sanction is given to the plan of construction; and that official sanction is given to the immediate construction of specific units. To "approve"

means "*to sanction officially;* to ratify; to confirm". To "authorize" means "to clothe with authority, warrant or legal power; to give a right to act; to empower, *to give legal sanction,* to make legal, to legalize; *to sanction or to confirm by the authority of* someone"[73a] (Webster's *New International Dictionary*). From this it is evident that the words "approve" and "authorize" have a common connotation.

This common meaning between the words "approved" and "authorized" has also been recognized in judicial decisions.[74]

(iv) In river and harbor, flood control and power legislation these words are often used interchangeably, or one is implied in the other. For example:

(*a*) In Section 1 (c) of the Flood Control Act of 1944 (App. p. 18), it is provided that "the proposed work shall not be deemed authorized, except upon approval by an Act of Con-

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[73a] The synonym of "authorize" is "to ratify", which means "*to approve* and sanction; to make valid, *confirm*, establish, settle; especially *to give sanction to*". The synonyms of "ratify" are "*sanction, authorize, confirm*".

[74] *Hubbard* v. *Fort*, 188 F. 987, 997; *Apfel* v. *Mellon*, 33 F (2d) 805, 806; *Tibbens* v. *Clayton*, 288 F. 393, 396; *Stewart* v. *Yellowtail*, 35 F. Supp. 798, 799; *Creek Nation* v. *United States*, 318 U. S. 629, 639; *Loeb Co.* v. *Avoyelles Drainage Dist.* No. 8, 92 F. Supp. 126, 127.

gress". Thus "approval" constitutes or results in "authorization".

(*b*) When Section 9 of the Act (App. pp. 20–1) was debated in the House on the Conference Report, a question arose as to the meaning of the provisions that comprehensive plans were "approved" for the development of the Missouri River basin, and that prosecution of the initial stages of the plan was "authorized". Representative Curtis, one of the conferees of the House, explained this language as follows (90 Cong. Rec. 9284):

> It means that Congress has *approved* the general plans of the engineers, and *it means that these plans are authorized by law* and are, therefore, eligible for future appropriations. Without such an authorization no appropriation can be had. [Emphasis supplied.]

(*c*) Section 13 of the Flood Control Act of 1944 (App. pp. 25–6) deals with the works of improvement "for runoff and water flow retardation and soil erosion prevention", to be undertaken by the Department of Agriculture. The first paragraph of Section 13 follows the general structure of the first paragraph of Section 10, which "adopted and authorized" public works to be prosecuted by the Secretary of War. In the succeeding paragraphs of Section 13, the word "approved" appears in lieu of the word "authorized"

as used in the paragraphs designating the improvements in Section 10 of the Act. Thus, while in Section 10 the various provisions read that a given project or project unit is "*authorized* substantially in accordance with the recommendations of the Chief of Engineers * * * at an estimated cost of $——", the language used in Section 13 is that the works are "*approved* substantially in accordance with the recommendations of the Under Secretary of Agriculture * * * at an estimated cost of $——." [Emphasis supplied.]

(*d*) In Section 2 of the Rivers and Harbors Act of 1945 (App. p. 28) the plan for the improvement of the Alabama-Coosa River was "authorized" and so also were appropriations "authorized". In the same provision these authorizations are referred to as "the aforesaid authorization and approval", an expression which could be construed to mean that the plan was "authorized" and the appropriation was "approved". Actually, the word "approval" referred to the "authorization" of the plan, which clearly shows that these words are used interchangeably.

(*e*) In Section 7 (b) of the Federal Power Act it is provided that, in the circumstances therein stated, the Commission "shall not *approve* any application for any project." This means that the Commission shall not "authorize" or "give legal sanction" to the construction of the project applied for. This is the meaning to which the Com-

mission gave effect, when it *dimissed* the application of the Savannah River Electric Company for the Clark Hill Project.

(f) Further evidence of the interchangeability of the terms "approved" and "authorized" is to be found in their use by the administrative agencies charged with the duty and function of carrying out their respective statutory requirements. For example:

Although the paragraphs in Section 13 of the Flood Control Act of 1944, describing the various projects, use the term "approved", and do not use the word "authorized", the Department of Agriculture, at the hearings on its Appropriation Bill for the fiscal year 1948, submitted a statement in which the following appears (pp. 927–8):

> The watershed treatment programs recommended in 11 survey reports were published as House documents and *approved* by the Congress, and watershed improvement programs in accordance with their provisions were *authorized* in the Flood Control Act of 1944.
>
> * * * * *
>
> The 11 watershed improvement programs which have been *approved* and *authorized* by the Congress call for a total of about $90,000,000 of federally financed work. [Emphasis supplied.]

Substantially the same statement was submitted by the Department of Agriculture at the hearings

on its Appropriation Bill for the fiscal year 1949 (p. 5).

In the hearings on the Department of Agriculture Appropriation Bill for 1950, the spokesman for the Department testified "concerning the 11 *authorized* watersheds" (p. 25).

The interchangeability of the terms "approved" and "authorized" in the nomenclature of the Army Engineers is illustrated by the very statement of Colonel Gee, on which the court below relied for the proposition that these terms are not used interchangeably, and do not have a common meaning in this legislation, but are so different as to warrant a decision of grave consequence. Despite his effort to set up a distinction between "approval" and "authorization", Colonel Gee specifically referred to the "approved" Roanoke River plan as an "authorized" plan, when he said (App. p. 147):

> Mr. Chairman, I would like to point out at this time that the authorizing of construction on the Smith Mountain project represents a deviation from the original recommendations of the Chief of Engineers *when this basin plan was authorized.* [Emphasis supplied.]

And when Congressman Ford, referring to the Gaston site, asked (App. pp. 167–8):

> And you have indicated there is a possibility that another power company will make a similar application at *another authorized site.* [Emphasis supplied.]

Colonel Gee answered: "Yes, sir."

(v) Despite these uses of the terms "approve" and "authorize", Respondents argued that by the term "approved", Congress simply meant that it laid down a guide as to what would constitute a desirable comprehensive plan to be followed by the Corps of Engineers in constructing projects in the Roanoke River Basin, and by the Commission in licensing projects in the Roanoke River Basin to non-Federal interests (Comm'n, p. 21).

This interpretation of the term "approved" can have no validity, because it is in conflict with language used by Congress both in the introductory paragraph of Section 10 and in the paragraph under consideration. In the introductory paragraph, Congress "adopted and authorized" works of improvement to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers "in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein". Likewise, in the paragraph entitled "Roanoke River Basin", Congress "approved" the comprehensive plan "recommended by the Chief of Engineers" in House Document Numbered 650. In these circumstances, the interpretation suggested can have validity only if House Document 650 recommended that both the Army Engineers and non-Federal interests may proceed with the development of the Roanoke River Basin. Furthermore, Congress did not provide that the

works of improvement were "adopted and authorized" to be prosecuted, either *by the Army Engineers, or by non-Federal interests* under license from the Federal Power Commission. It specifically provided that these should constitute "public works" and should be prosecuted "under the direction of the Secretary of War and the supervision of the Chief of Engineers". (See n. 72, p. 147, *supra*.)

(vi) Respondents' argument has its source in another meaning of the word "approved"; namely, "well thought of" or "regarded with favor". The application of this meaning of the word "approved" in flood control legislation would be absurd, and statutes may not be so interpreted as to attribute an absurd result to Congress.[75] It would, indeed, be absurd for the Congress and the President of the United States to announce to the entire world that the general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes as recommended by the Chief of Engineers "shall be highly regarded" or "shall be well thought of". Congress does not enact flood control legislation for the purpose of commending the investigations or reports of the Army Engineers to admiration by the public.[76]

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[75] *United States* v. *Kirby*, 7 Wall. (74 U. S.) 482, 486–7; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59.

[76] It would be equally absurd, if the meaning were ascribed to the word "approved" in Section 7 (b) of the Federal Power Act. When Congress laid down the rule that the Commis-

Yet, that is exactly what was involved in the Examiner's statement that, in approving plans for development, Congress "gives its approval to a comprehensive basin plan for the full physical development of the water resources of a river basin for the purposes prescribed by law, so that if and when the development by the United States of any of the projects named therein appears desirable, it can act with a minimum of delay" (III, 1063–4, 1074–5). It would indeed be a useless act for Congress to provide for this inventory of possible developments, since such inventories are already included in the Army's "308 reports".[11]

The Examiner's interpretation was adopted by the court, when it said (V. 38):

> A report submitting a plan of river development, if approved by Congress, lays down in general terms the policy of development to be followed. It does not authorize projects embraced in the plan of the development or commit Congress to constructing them.

While it is true that *the report* does not authorize projects embraced in the comprehensive

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sion "shall not approve any application for any project affecting" a Federal development of water resources for public purposes, it meant that the Commission "shall not" authorize or give legal sanction to the construction of such a project. It did not mean that the Commission, while it may grant a license, was prohibited from thinking highly of the project, or from regarding it with favor.

[11] *Oates* v. *National Bank*, 100 U. S. 239, 244.

plan, the act of Congress does; and while the report does not commit Congress to constructing projects, and it may even be said that Congress does not commit or bind itself or any future Congress, the act of Congress is nevertheless binding on all others, including the Corps of Engineers and the Federal Power Commission.

In view of the above, it must be concluded that the language of the statute indicates that the entire comprehensive plan has been entered upon by the Government as a single Federal undertaking, whether one looks to the introductory paragraph of Section 10, or to the paragraph entitled "Roanoke River Basin".

(c) *Misapplication of expressio unius*

Since each "work of improvement" or "project for the improvement of a waterway" in each flood control act is listed in a separate paragraph, designating what was "approved" or "authorized", the court below regarded these paragraphs as constituting specific provisions which supersede the general provision in the introductory paragraph that "the following works of improvement are * * * adopted and authorized". *"Expressio unius est exclusio alterius"*, said the court.[78]

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[78] We shall not dwell on the proposition that "*exclusio unius*" and the rule that a specific provision supersedes a general provision are not one and the same, but are separate rules of construction.

According[ly] it held that in the paragraph entitled "Upper Mississippi River Basin" (App. p. 24), where additional funds were "authorized to be appropriated for the prosecution of the plan approved" in the 1938 Act, Congress "authorized" the entire river basin plan and the Government entered upon it (V, 34–5). In the case of the comprehensive plan for the development of the Roanoke River Basin, however, the court held that the Government had not entered upon this plan in its entirety, but only upon the construction of Buggs Island and Philpott, which had been "authorized" at the estimated amounts stated.[79]

[79] Apparently the court below did not consider that in the Flood Control Acts of 1936, 1938, 1941, 1944, 1946 and 1950 there are numerous paragraphs in which the works of improvement are listed without the use of the terms "adopted", "approved", or "authorized". In many instances, also, it is provided that the sum of money is authorized "for the initiation and partial accomplishment" of the project or of the plan, as the case may be, which (if the court's test were applied) would raise a question as to what part of the plan had been entered upon by the Government. In some instances funds are authorized to be appropriated for a river basin plan, the projects therein to be selected and approved by the Chief of Engineers. In these instances, also, a question would arise as to what work of improvement the Government had entered upon. Furthermore, at times a comprehensive plan is approved and a sum of money is authorized to be appropriated for the plan, but this is followed by provisions listing specific projects within the plan and the amounts authorized to be appropriated for such projects. In other words, Congress has employed a great variety of expressions, rather than a simple dichotomy of plans "authorized" and those "not authorized". (See n. 58, p. 12[2], *supra*.)

There are a number of infirmities attending this interpretation:

(i) The provision entitled "Upper Mississippi River Basin" itself consists of an introductory paragraph followed by 7 paragraphs each describing a project within this basin authorized at an amount stated. With equal reason, each of these may be said to be a specific provision superseding the more general introductory provision with reference to the Upper Mississippi River Basin.

(ii) The difference between the provision for the "Upper Mississippi River Basin" and that for the "Roanoke River Basin" is simply that, whereas in the authorization of funds for the latter it was provided that they should be used for Buggs Island and Philpott as the "initial step" in the development, there was no such limitation in the introductory paragraph of the provision relating to the Upper Mississippi River Basin.

(iii) The fact remains that there is no one-to-one correspondence between words and ideas. A word may be used to express more than one idea; and one idea may be expressed by more than one word. In legislation, as in other fields of expression, different words are often used to express the same thought, even if only to avoid repetition. Neither the rule of *expressio unius* nor the rule that a specific provision prevails over a general

provision dispenses with the necessity of ascertaining the meaning of the words used, and, as has been shown, the words "approved", "adopted", and "authorized" have common connotations.

(iv) Whatever may be the differences in the provisions relating to the Upper Mississippi River Basin and the Roanoke River Basin, neither provision uses the word "adopted". According to the statute, "adoption by law" marks a "project for the improvement of a waterway" as being entered upon by the Government. Therefore, if (according to the court below) the plan for the Roanoke River Basin has not been adopted, it should follow that neither has the plan for the Upper Mississippi River Basin been adopted.

A thorough search of all the provisions in the Flood Control Acts of 1936, 1938, 1941, 1944, 1946 and 1950 discloses that of the hundreds of projects listed there are only two "works of improvement" which are described as having been "adopted". They are (1) a project (the Denison Reservoir) on the Red River in Texas and Oklahoma, and (2) the comprehensive plan for the improvement of the Lower Mississippi River Basin. In Section 4 of the Flood Control Act of 1938, the provision entitled "Red River Basin" contains the following:

> The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Con-

> gress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is *adopted and authorized* at an estimated cost of $54,000,000. [Emphasis supplied.]

The provision entitled "Lower Mississippi River" in the 1938 Act, and carried into the later flood control acts, contains the following:

> That in accordance with the recommendations of the Chief of Engineers, as set forth in his report of April 6, 1937, and published as Flood Control Committee Document Numbered 1, Seventy-fifth Congress, first session, paragraph 38 (b), except subparagraph (1), the project for flood control of the Lower Mississippi River *adopted* by the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, is hereby modified and, as modified, *is hereby adopted,* and there is hereby *authorized to be appropriated* in addition to the sums previously authorized $40,000,000 to be applied for the purposes set forth in said document covering the said recommendations, with the exceptions mentioned, subject to the provisions hereinafter made. [Emphasis supplied.]

A mechanical application of the rule *expressio unius est exclusio alterius* or of the rule that specific provisions prevail would yield the conclusion that of the hundreds of improvements in the flood control acts, only two stand out as having been "adopted by law" and entered upon by the

United States. The difficulty with this application of the rule is that it leads to absurd results which cannot be attributed to Congress.

Even the rule that a specific provision prevails over the general provision calls for more than a mechanical application. In order to apply this rule, one must first ascertain whether the provision operates as an exception to, rather than as an application of, the general rule. In all cases in which it was held that a specific provision will control over a general provision, the rationale is that either the specific provision deals differently with the subject matter to which the general rule would be inapplicable, or that the specific provision constitutes an exception to the general rule. In no instance does the specific provision nullify or abrogate the general rule.[80] In the case at bar, such is the effect of the court's application of this rule of statutory construction.

Section 10 provides:

> "The following works of improvement * * * are adopted and authorized * * * to be prosecuted under the direction of the Secretary of War * * *.

This is the general provision. If the paragraph entitled "Roanoke River Basin" were an exception to the general provision, then so also

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[80] It is for this reason that *Ginsburg & Son* v. *Popkin*, 285 U. S. 204 and *MacEvoy* v. *United States*, 322 U. S. 102, relied on by the court below, are inapposite.

would be all the other paragraphs, except the one relating to the Lower Mississippi River Basin. There would then be no need for the introductory paragraph "adopting and authorizing" the works of improvement. We submit that such an application of the rule *exclusio unius* flies in the face of the primary rule of statutory construction that every word in the statute must be given effect, and that Congress cannot be presumed to have used superfluous language.[81] This is especially so when the statutory words under consideration are the key words of an enactment which follows a definite pattern of legislation (App. pp. 53–4, 73–4).

B. OUR INTERPRETATION OF THE STATUTE IS IN ACCORD WITH ITS HISTORY AND PURPOSE

In interpreting a statute, it is important that it be in harmony with the system of legislation of which it is a part.[82] It is especially important that our analysis of the statutory provisions should meet this test, since the court below justified its interpretation in the light of "the history

[81] *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48, 58; *Bernier* v. *Bernier*, 147 U. S. 242, 246; *Wilkinson* v. *Leland*, 2 Pet. (27 U. S.) 627, 662; *Washington Market Company* v. *Hoffman*, 101 U. S. 112, 115.

[82] *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386, 396; *Hynes* v. *Grimes Packing Company*, 337 U. S. 86, 116.

of flood control legislation" and "the reason and purpose of the [Federal Power] act before us" (V. 38). We shall therefore show that our analysis of the statute, not the court's, is in accord with the history and purposes of both (1) the Federal Power Act and (2) the flood control acts.

(1) *The interpretation conforms with the purposes of the Federal Power Act.*

The history of the Federal Power Act shows that Federal river basin developments for flood control, power and other purposes are in conformity, not in conflict, with the policies and provisions of that Act, and such was the administrative interpretation of the Commission itself contemporaneous with the initiation of such river basin programs (App. pp. 76–80). Therefore we agree with the court's observation (V, 40) that "there is nothing in subsequent legislation to indicate any intention to depart from the policy embodied in the Federal Power Act."[83]

While it is true that under Section 7 (b) of the Federal Power Act an application for license may not be granted if, *in the judgment of the Commission,* the development of the water re-

[83] In this connection, it should be pointed out, however, that in its statement of the purpose of Section 7 (b) of the Federal Power Act (V, 32–3), the court below really had reference to Section 7 of the Federal Water Power Act as enacted in 1920, not as amended in 1935 (App. p. 36; see pp. 244–5, *infra*).

sources should be undertaken by the United States, it does not necessarily follow that if the Commission does not express such a judgment a license may in all instances be granted. By Section 4 (e) of this very statute (App. pp. 32–5), the Commmission may not isssue a license for a project affecting navigable capacity, if the plans and specifications are not approved by the Secretary of the Army and the Chief of Engineers; nor may it issue a license for a project on a Federal reservation, except after a finding that such license would not be inconsistent with the purposes of the reservation, and then only upon conditions laid down by the Secretary having jurisdiction.

The history of flood control and power legislation shows that there are other statutes limiting the availability of projects which may be licensed for non-Federal development, where the limitation depends upon a judgment exercised by some authority other than the Commission, for example, by the Secretary of the Interior under Section 9 (a) of the Reclamation Project Act of 1939 (App. p. 17) or by Congress itself (App. pp. 67, 76).

By the various flood control acts, including the Flood Control Act of 1944, Congress itself diminished the number of projects available for non-Federal development. Whereas under Section

7 (b) of the Federal Power Act the availability of projects for non-Federal development depends upon a judgment of the Commission, in the flood control acts Congress has from time to time specified what water resources were to be developed by the United States.

There was no occasion for Respondents' *argumentum ad horrendum* that our interpretation of the flood control acts would constitute a *pro tanto* repeal of the Federal Power Act, contrary to the presumption against repeal by implication (Comm'n. p. 15), or for the court's statement that withdrawal of project sites for Federal development would mean "to strip the Commission of a great part of its control over the important rivers of the nation" (V, 35).

Part I of the Federal Power Act is a general statute embodying a comprehensive scheme of regulation which the Commission is empowered to exercise over project sites, the licensing thereof, and the regulation of the licensees. In the Flood Control Act of 1944, Congress passed a statute which reserved specific projects or river basins for development by the United States. The later act conforms with the purpose and provisions of the Federal Power Act, to leave for non-Federal development only such projects as would not affect those which are to be developed by the United States. Therefore, while we agree that Congress

has neither repealed nor modified the Federal Power Act, we do assert that it has reduced the number of project sites available for licensing under this Act.

In this manner, the provisions of the Federal Power Act and of Section 10 of the Flood Control Act of 1944 are reconcilable. However, if these statutes are not reconcilable, then, of course, the later statute must be held to supersede the earlier one.[84]

Furthermore, such withdrawals will not affect the Commission's exercise of its licensing jurisdiction to any considerable extent (App. pp. 80, 89). As of the end of the fiscal year 1951, about 500 major project sites (capacity of 2,500 kw. or more) have been occupied by non-Federal interests. Of these, only 110 have been licensed. To date, only about 200 such major project sites have been occupied or reserved for Federal development. There are now about 400 constructed projects and over 1,600 new project sites (of 2,500 kw. or more) to be licensed. In the past 30 years, the Commission has licensed projects which had been constructed or were under construction at the average rate of 2½ per year and has licensed new projects at the average rate of 1 per year (App. p. 89). At this rate, there is ample opportunity for the exercise of the Commission's licensing authority with respect to constructed projects for the next 160

[84] *United States* v. *California*, 297 U. S. 175, 187–8.

years, and with respect to new projects for the next 1,500 years.[85]

(2) *Our interpretation is in accord with the history and purpose of the Flood Control Acts*

The court's conception of the history of flood control legislation is embodied in the following statement (V, 40):

> The various flood control acts were directed to the construction of dams where flood control was the principal object and the production of hydroelectric power was incidental. For constructing these, over-all plans of river basin development were necessary in the interest of navigation as well as of flood control; and it is not reasonable to assume that, in approving such plans and undertaking the flood control projects which they envisaged, Congress intended to withdraw from development by private enterprise the straight power projects lying in the river basins.

It is admitted, of course, that the primary purpose of flood control acts is flood control; just as

[85] This is not intended as a reflection on the Commission's accomplishments. When one speaks of serious curtailments of the Commission's functions one must consider the rate at which water power resources are being developed by non-Federal interests. Still slower is the rate of development, if consideration is limited to private power companies (App. p. 81). On the other hand, Federal development of the water power resources has proceeded much more rapidly, as may be seen by comparing the development of the Tennessee River basin before and after the enactment of the TVA Act.

reclamation acts are primarily for irrigation, and river and harbor acts are primarily for navigation. This does not mean, however, that in multiple-purpose projects power development is "incidental" in the sense that it is of minor importance, especially since power development makes flood control feasible and supports irrigation and other public uses (App. p. 91).

Even if power development were incidental in the sense of being less important, it is incorrect to say that over-all plans of river basin development for navigation and flood control were necessary for the construction of dams for flood control and power development. The reverse is correct. The construction of dams for flood control and allied purposes is necessary for comprehensive river basin developments, and the latter are necessary to derive the maximum potential benefits from the utilization of water resources.

Even if the court's statement were correct in this respect, it does not follow at all that it is "not reasonable" to assume that Congress intended to withdraw "straight power projects" from private development. Nor does it follow, as the court below said, that the authorization of dams primarily for flood control "would seem to negative any suggestion that it was intended to authorize straight power projects, like Roanoke Rapids, merely because they were embraced in the general plans that were given approval" (V, 35).

The court's approach is erroneous, both historically and analytically. From the history of flood control legislation (App. pp. 48–81), one can readily see that beginning with the Act of March 1, 1917, all the provisions of law applicable to improvements for navigation were made applicable to improvements for flood control, that thenceforth the dominant concept was to promote these improvements on a multiple-purpose river basin basis, and that beginning with the Flood Control Act of 1936, the Government itself entered upon such improvements.

Considering the history of flood control legislation, we submit that, even if Congress had not expressly stated in the 1944 Act that it adopted and authorized these projects as "*public works*", to be carried out "*under the direction of the Secretary of War and supervision of the Chief of Engineers*", "*consistent with budgetary requirements*", the necessary implication would have been that these works were to be carried out by the Army Engineers with Federal funds, and not by any private person acting under a license of the Federal Power Commission or otherwise.

Analytically, the fallacy in the court's approach lies in looking to each dam as a "project" approved by Congress when, as a matter of fact, the project approved was the river basin plan. This becomes clear with reference to the river

basin plan under discussion, when one considers the provision of law requiring that in making his reports the Chief of Engineers must be guided by the principle laid down by Congress. In the Flood Control Act of 1936, Congress declared its policy that the Federal Government should improve or participate in the improvement of navigable waters and their tributaries, including the watersheds thereof, "if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected", 33 U. S. C. 701a (App. p. 3). It then provided that investigations and improvements "for flood control and allied purposes" shall be under the jurisdiction of and shall be prosecuted by the War Department. It further provided that, in his reports upon examinations and surveys, the Secretary of War, in the determination of the Federal interests involved, shall be guided by the principle enunciated; namely, that if the benefits would exceed the estimated costs, or if the lives and social security of people are otherwise adversely affected, he should recommend that the improvements be undertaken by the Federal Government, 33 U. S. C. 701b (App. p. 5). When the Chief of Engineers submitted his report, H. Doc. 650, it must be assumed that he acted in accordance with these requirements of the law. There is a presumption of regularity

which attaches to his as to any other Governmental action.[86]

The Chief of Engineers submitted the comprehensive plan for the improvement of the Roanoke River Basin for navigation, flood control and power development with a feasibility ratio of 1.47, *as a single package*. He did not submit 11 separate projects. Had he done so, he would not have complied with the requirements of the law stated above, since Randolph and Schoolfield were by themselves infeasible, their benefit-cost ratios being less than 1. He probably would not have submitted reports on 3 other projects, Smith Mountain, Taber and Stuart. When Congress approved the plan, it approved it as recommended by the Chief of Engineers; namely, as a single project, with a showing of its feasibility ratio of 1.47.

The notion of "straight power projects" is applicable only to the units of a project, not to the project itself. Taken by themselves, Roanoke Rapids, Gaston, the powerhouse at Buggs Island, and other units in the plan may be referred to as "straight-power projects", but the comprehensive plan is a project for "flood control and other purposes". Thus spake Congress.

C. APPLICABLE RULES OF STATUTORY CONSTRUCTION

In addition to the rules of interpretation discussed above, which really come under the heading

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[86] *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15.

of sources of interpretation, the result reached is also in accord with the requirements that (1) remedial legislation should be liberally construed, (2) public rights should be preferred to private rights, and (3) unjust and unreasonable results should be avoided.

(1) *The Flood Control Acts Require a Liberal Construction*

It is an established rule of statutory construction that remedial legislation should be liberally construed.[87]

Flood control legislation is remedial in character. This is evident from its history and especially from the Congressional finding contained in Section 1 of the Flood Control Act of 1936 (App. p. 7). The evil there recognized was that

> destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare;

The remedy for that evil, provided for in the same section, was

> that the Federal Government should improve or participate in the improvement of

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[87] *Socony Vacuum Co.* v. *Smith*, 305 U. S. 424, 431. *Western Union Telegraph Company* v. *Eyser*, 19 Wall. (86 U. S.) 419, 427.

> navigable waters or their tributaries, including watersheds thereof, for flood-control purposes.

The method provided to effectuate this remedy is stated in Section 2 of that Act (App. p. 8); namely, that

> hereafter, Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers.

This method was implemented in Section 10 of the Flood Control Act of 1944 by the adoption and authorization of

> works of improvement for the benefit of navigation and control of destructive flood waters and other purposes * * * in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program.

These statutory provisions call for the broadest possible construction which would accomplish the remedies against floods to the fullest possible extent. This can best be done only if the flood control statutes are so interpreted as to provide for comprehensive river basin developments. Therefore, when Congress, in approving the gen-

eral plan for the comprehensive development of the Roanoke River Basin, consisting of 11 project units, stated that it was "for flood control and other purposes", it was error to break up the comprehensive plan into its constituent parts, refer to some of the units as "straight power projects", and thus arrive at the conclusion that they were not intended for Federal development. This is especially so when, as has already been stated (pp. 118–9, *supra*), Gaston and Roanoke Rapids are, in point of fact, powerhouses of the great Buggs Island reservoir. The three units—Buggs Island powerhouse, Gaston powerhouse and Roanoke Rapids powerhouse—are simply means for converting the flood-waters stored in the Buggs Island reservoir into electric energy.

It is admitted that the Federal Power Act is also a remedial statute requiring a broad construction. Therefore, to reconcile the Flood Control Act with the Federal Power Act, one must balance this rule against the rules preferring public to private rights and requiring avoidance of unjust and unreasonable results.

(2) *Public rights should be preferred to private rights*

It is a settled rule of statutory construction that public rights must be preferred to private rights.[88]

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[88] *Mills et al.* v. *St. Claire County et al.*, 8 How. (49 U. S.) 569, 581; *Commercial Standard Insurance Company* v. *Robertson*, 159 F. (2d) 405, 410; *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, 552.

Even if there were a reasonable difference of meaning which could be ascribed to the terms "approved" and "authorized", such difference must be resolved in favor of public rights, rather than in favor of private rights. Here, however, there is not even a private right involved. The conflict is between the United States which has the *right* to develop its water resources, and a private corporation seeking a license under the Federal Power Act, which is a grant of a public *privilege*.[89] Therefore, the greater is the reason why the statute should be interpreted broadly in favor of the United States and against VEPCO.

But even without this rule, and assuming that the only consideration were to balance the interests of the public and of VEPCO, it is difficult to see why any differences as to the meaning of the legislation should be resolved in the latter's favor. A mere glance at VEPCO's basic Exhibit 15 is sufficient to disclose that no system planning purpose would be served by authorizing the construction of a project which, according to the Commission, has a feasibility of only $150,000 per year, when the evidence shows, and the facts have now been established, that VEPCO could obtain its needed additional capacity from the

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[89] *Northern States Power Company* v. *Federal Power Commission*, 118 F. (2d) 141; see also *Alabama Power Company* v. *Federal Power Commission*, 128 F. (2d) 280, 288; *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 427.

projects constructed by the Government at less than half the cost of capacity from its own hydro-electric or steam plants.[90]

In these circumstances, balancing the interests and conveniences of VEPCO against those of the public, there is no reason why the flood control acts should be put into a strait jacket of narrow interpretation and thus deprive the United States of the opportunity to develop the Roanoke River Basin by means of the comprehensive plan approved by Congress.

Respondents argue, however, that "no violence is done to the rule that the choice must be resolved against a private corporation since the Federal Power Act provides the full protection of the public's interest in its water power sites considered desirable by Congress and authorizes the issuance of licenses to private corporations" (Comm'n, p. 22). If this argument means that the public's interest in water power sites is exhausted when a license is granted under the Federal Power Act, it is a proposition which has no basis in law or in fact. Surely this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, relied on by Respondents, had no occasion to make and made no such pronouncement.

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[90] The evidence shows that the annual cost of capacity is $22.54 per kilowatt year (II, 591). Under the contract with SEPA, VEPCO obtains dependable capacity at $10.80 per kw.-year, and non-dependable capacity for considerably less.

Respondents question whether "there are benefits to the public under the 1944 Act * * * preferable to the benefits to the public under the Federal Power Act". We do not think that either Petitioners or Respondents are in a position to debate the relative virtues of the two acts, since Congress has spoken on the subject. The two acts must be reconciled, and if they cannot be reconciled, then the later statute must govern (see pp. 167–8, *supra*).

(3) *Unjust and unreasonable results must be avoided*

It is an important rule of statutory construction that statutes should not be so interpreted as to lead to unjust or unreasonable results.[91]

One of the effects and consequences of our interpretation of Section 10 of the Flood Control Act of 1944 is that the approval of the comprehensive plan for the development of the Roanoke River Basin means that Gaston and Roanoke Rapids have been reserved for construction by the United States. This means that the fruits of the Government's investment in Buggs Island will inure to the people in the area (see pp. 121–2, *supra*). In the case of Roanoke Rapids alone, the net power benefits to be distributed to the people will exceed $1,500,000 per year.

The court below stated that its interpretation was right, considering "the effects and conse-

[91] *United States* v. *Kirby*, 7 Wall. (74 U. S.) 482, 486–7. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59.

quences of the interpretation placed upon it [the act] by the Secretary" (V, 38). The surrender of the fruits of the Government's investment in Buggs Island is one of the effects and consequences of the court's interpretation. Net power benefits in excess of $75,000,000 over the 50-year period of the license would be surrendered to VEPCO, instead of being distributed to the people in the area.

Our position is that this is an unjust and unreasonable result. The Government is supposed to operate for the benefit of the people generally, not for a select few. As President Truman said in an address made on September 4, 1951 (97 Cong. Rec. 11768, Sept. 18, 1951):

> When we produce electric power at Shasta Dam, when we develop the Roanoke Basin in Virginia, it ought to be for the benefit of the people and not for the benefit of the private power companies.

The court below held that (a) to permit the construction of this project by VEPCO "will surrender no public assets to anyone" (V, 46), because (b) the Government will be paid headwater benefits in the amount of about $250,000 per year (V, 40, 46). We submit that these holdings are erroneous.

(a) *Surrender of public assets*

We have already stated the facts concerning the surrender of net power benefits (pp. 59–60, *supra*).

(i) In holding that no public assets would be surrendered, the court sustained the following arguments urged by Respondents: Both before the Commission and in the court below, Respondents maintained that the figure of $1,500,000 per year was an exaggeration, because, if the Government constructs Roanoke Rapids, it will lose the revenue it would derive from taxes which would be paid by VEPCO. Exhibit 15 shows that the Federal income taxes would amount to $713,000 per year.

Theoretically this is so, but one must look to realities, rather than fictions. In reality, public utilities do not pay these taxes; they are conduits for the payment of taxes; they are, in a sense, private collectors of revenue, because their taxes are treated as operating expenses and are included in the charges for electric service paid by the consumers. In the years of excess profit taxes, the public utilities passed even such taxes on to the consumers.

The theory behind the distribution of net power benefits to the people is that in this manner the Government will enable them to raise their standard of living and appear as taxpayers in their own right, so that they might be able to make their own contribution to the "price of civilization". Therefore, while it may be true that the tax revenues to the Government will not take the form represented on Exhibit 15, Respondents'

argument is not a demonstration that the Government would thereby lose needed revenue. The probabilities are that, through the application of the Federal Power Policy, the burdens of taxation will be diminished.

(ii) Respondents also assert that our statement, concerning the surrender of the benefits of the investment in Buggs Island to VEPCO, has no basis in law. In this, their position is contrary to that stated by this Court in *Ashwander* v. *T. V. A.*, 297 U. S. 288, 330 *et seq.* Having invested over $78,000,000 in Buggs Island, the United States has a property right in the flood waters stored in the reservoir. This property right includes utilization of the stored water for the purpose of converting its flow into electric energy. The best utilization consists of letting this water flow successively through three powerhouses, rather than through one, or even two. By issuing a license for Roanoke Rapids, the property right of the United States is abridged to the extent of $1,500,000 per year. If a license were also issued for Gaston, the property right of the United States would be further abridged to the extent of $790,000 (I, 144), based on 1941 estimates. This abridgment of the property right constitutes a surrender or a taking of property.

Perhaps this point can be further clarified, by reversing the position of the parties. Let us assume that VEPCO constructed Buggs Island and that it had a *right* to construct Roanoke

Rapids; also, that by constructing Roanoke Rapids with Buggs Island in operation, its net power benefits would be increased by $1,500,000 per year. Let us suppose further that the Commission then issued a license to some other applicant for the construction of Roanoke Rapids. Would not VEPCO then complain that the net power benefits were its potential assets [92] and that, therefore, it would be deprived of its property without just compensation? And would not the measure of just compensation be $75,000,000 over the 50-year period of the license? [93]

(iii) Respondents argued that the United States would not be deprived of these net power benefits, because they are intended to be distributed. But this argument is erroneous because, until the net power benefits are distributed, they are potential assets of the United States. [94] The taking of the property is no less serious because it belongs to the United States, rather than to a private party.

The law of the land provides (Const. Art. IV, Sec. 3, Cl. 2):

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other

[92] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328–9.

[93] *Olson* v. *United States*, 292 U. S. 246, 255.

[94] *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195.

> Property belonging to the United States * * *.

While it is within the Constitutional authority of Congress to dispose of these net power benefits, it is not within the authority of any other agency of the Government to do so, unless expressly authorized by act of Congress.[95] Congress was, therefore, the proper tribunal to which VEPCO should have addressed itself, if it wanted to construct a project at Roanoke Rapids and thereby take over potential assets of the Government, the course pursued by the Savannah River Electric Company after the decision in the *Clark Hill case* (App. pp. 94–5). In the absence of a law to this effect, the net power benefits of the Roanoke Rapids unit must be disposed of in accordance with the existing "rules and regulations" prescribed by Congress; namely, by the Secretary of the Interior in accordance with Section 5 of the Flood Control Act of 1944.

In these circumstances, the court's holding that to permit the construction of Roanoke Rapids involved no surrender of public assets to anyone is erroneous both in fact and in law.

(b) *The payment of headwater benefits*

Let us see whether the payment of headwater benefits would fully compensate the United States for the loss of the net power benefits.

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[95] *Royal Indemnity Company* v. *United States*, 313 U. S. 289, 294–5; *United States* v. *Nicoll*, 27 Fed. Cases (Case No. 15,879) 149, 150.

Throughout the proceedings below, Respondents' argument has been that whatever benefits are conferred at Roanoke Rapids will be paid for by VEPCO after assessment of headwater benefit payments under Section 10 (f) of the Federal Power Act (App. p. 37). Petitioners argued that there is a difference between the assessment of headwater benefit payments which reflect the benefits conferred by Buggs Island on VEPCO's proposed project, and the benefits which the United States would derive by constructing its project at Roanoke Rapids. This argument was not met in the decisions of the Examiner, the Commission, or the court. Each of them avoided this issue.

(i) The Examiner disposed of this question by referring to the testimony of Colonel Gee, stating: "Colonel Gee reassured the Committee that such reimbursement must be made as required by law" (III, 1075). The fact of the matter is that Colonel Gee was not in any position to reassure the Committee, the Committee was not reassured, and Colonel Gee's statements consisted merely of evasion of the questions asked by the Chairman of the Committee (App. pp. 178–9).

When the Chairman asked him what justification there would be for having some units of the comprehensive plan constructed by the Government, and others by private interests, Colonel Gee stated that the Government would receive head-

water benefit payments, like any other upstream developer, under Section 10 (f) of the Federal Power Act. The Chairman then asked: "Where have they ever paid for such benefits?" Colonel Gee's answer was that he could cite "several such projects". The Chairman pressed the question by asking for one "recently, this year or last year". Colonel Gee replied that "they are negotiating now on the Roanoke Rapids site". The Chairman stuck to his question: "Excuse me, where have they actually paid for a benefit that has accrued?" Colonel Gee answered that he would furnish the information for the record. The information he furnished showed one case in which headwater benefits were assessed in 1939. That was the only case in the 30 years of the Commission's existence in which headwater benefits were actually assessed. This is hardly a "reassurance" that the Government would be reimbursed for its investment in Buggs Island through the payment of headwater benefits.

(ii) The court below covered the same subject in the following language (V, 40):

> It was foreseen, of course, that the building of flood control projects would benefit power projects lower down the stream, but provision had been made, in Section 10 (f) of the Federal Power Act, for the Power Commission to assess the value of such benefits against the licensees of the power projects.

This proposition is erroneous both in theory and in fact. It is erroneous in theory, because the headwater benefit payments provided for in Section 10 (f) do not contemplate reimbursing the upstream developer for benefits which he would derive by constructing projects downstream, but only for an equitable part of the cost of operation, maintenance and depreciation in the upstream development. This cannot be more than the benefits actually conferred on the downstream project. The benefits conferred on the downstream project may be small, yet the benefits lost by the upstream developer may be very great. The benefits conferred may be great, yet the headwater benefit payments may be small.

The proposition is also erroneous in fact, because the evidence shows that the net power benefits which the Government would derive from constructing the Roanoke Rapids unit would be in excess of $1,500,000 per year (I, 223), whereas the headwater benefits, assuming that they have been correctly determined by the Commission, would be not more than $250,000 per year (I, 56). Even if the headwater benefits were actually assessed and paid (which in the light of history is very problematical) the net result would, nevertheless, mean that the United States would be deprived of over $62,500,000 in net power benefits over the period of the license. Such a result is unjust and unreasonable.

V. THE CONGRESSIONALLY-APPROVED COMPREHENSIVE PLAN HAS NOT BEEN SO MODIFIED AS TO OPEN ROANOKE RAPIDS TO NON-FEDERAL DEVELOPMENT

Ordinarily, the proposition that an act of Congress is still in effect should require no argument. An act of Congress can be repealed or modified only by an act of Congress, or by a law of equal or greater dignity. This holds true in this as in other types of legislation. Since acts of Congress are matters of public record, the assertion that a statute is still in effect can be disproved by reference to later legislation.

An illustration of how a comprehensive plan of river basin development may be modified is presented by the provisions of the Flood Control Act of 1944, in which Congress authorized the appropriation of additional funds "for the prosecution of the comprehensive plan approved in the Act of June 28, 1938, as modified by the Act approved August 18, 1941, for the White River Basin" (App. p. 24). The original approval of the comprehensive plan for the White River Basin is contained in the Flood Control Act of 1938 (App. p. 11). In the Flood Control Act of 1941 (App. p. 15), Congress authorized additional appropriations for the prosecution of this comprehensive plan "including * * * modifications in the Norfolk Reservoir Project recommended by the Chief of Engineers * * *."

In the proceeding below, however, the Commission's Staff Counsel urged that the Congression-

ally-approved comprehensive plan for the development of the Roanoke River Basin had been modified "by the pending application" and by the Army Engineers. He asserted that the Applicant's proposed project was best adapted "to a comprehensive plan of development of these water resources" (I, 183). The Examiner asked him whether he was speaking of "the plan presented by the Army Engineers," and Counsel answered that he was not, "because that plan has been modified." Explaining further, Counsel said: "I was referring to the plan set out in House Document 650, as it has been subsequently modified." Asked by the Examiner whether he meant "as it was modified by Congress," Counsel answered: "No, as it was modified by the Army Engineers." He then summarized his position as follows[36] (I, 184):

> Our position is, and Mr. Costello will present the letter in due course, that as modified by the pending application the Army Engineers have now approved a plan which calls for the most comprehensive development of the Roanoke River at Roanoke Rapids and that the plan proposed by this applicant is in conformity with that comprehensive development.

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[36] To avoid any misconception of the position of Staff Counsel, we shall quote, rather than paraphrase, his statement.

The letter presented was Exhibit 11 (I, 197-204) which was intended as "evidence" that the Congressionally-approved plan had been modified by the application filed in this proceeding, and that the Army Engineers then approved a new plan, which called for "the most comprehensive development of the Roanoke River at Roanoke Rapids" (whatever that may mean).

For an understanding of this "evidence", it is necessary to consider the nature of Exhibit 11 and the use made of it by Respondents.

In response to the Commission's request for comments on VEPCO's application, the Chief of Engineers addressed a letter to the Commission dated April 27, 1949, which is in the record as Exhibit 8 (I, 191). By a letter dated May 2, 1949, the Executive of Civil Works in the Office of the Chief of Engineers transmitted a document to the Chief of the Licensed Projects Division of the Federal Power Commission, and this document is Exhibit 11 (I, 197).

Exhibit 11 purports to be a copy of the Norfolk District Engineer's report on VEPCO's application, but it is not signed by the District Engineer, nor by anyone else. It is addressed to the Chief of Engineers, through the Division Engineer, but it bears no endorsement by the Division Engineer and no approval by the Chief of Engineers. It was not transmitted as the official report of the Chief of Engineers, and the let-

ter transmitting the report refers to the letter of April 27, 1949 (Exhibit 8) as "the official report of this office." Finally, it does not even purport to approve any comprehensive plan (certainly no comprehensive plan which would open Roanoke Rapids to non-Federal development), nor does it purport to modify any action taken by the Congress.

The origin of the document introduced as Exhibit 11 appears to be as follows (I, 210–212):

After VEPCO had filed its application, conferences were held by the Commission's Staff with representatives of the Applicant and of the Corps of Engineers. At one of these conferences VEPCO was requested to consider three additional plans, one of them (Plan D) being similar in design to the Roanoke Rapids unit included in H. Doc. 650, but with a much larger capacity and consequently involving much greater costs. In Exhibit 11 some unnamed Army Engineer made a comparison of the engineering and economic data relating to the four plans under private development, and demonstrated that, on the basis of a 5% return on the investment, Plan D would be the least feasible of the four plans (Table facing I, 202).

In this document, the text comparing these four alternative plans begins with a description of Plan D, and the opening paragraph is headed "Plan as proposed in H. Doc. 650 (Plan D)"

(I, 200). This heading has the appearance of identifying Plan D with the plan included in H. Doc. 650, and to that extent it is erroneous. Not only is Plan D different from the plan in H. Doc. 650 in capacity (see Exhibit 45, I, 219), but also in the owning or operating agency (one being a Federal and the other a private undertaking) and in feasibility (the feasibility ratio of the plan in H. Doc. 650 being 2.60, while that of Plan D is shown to be 0.76). We believe that the inaccuracy in this heading was not intended. It is an inaccuracy arising from excessive abbreviation, often found in chapter headings or in headlines of newspapers or magazines.

Respondents, however, made this heading the basis for attempting to show that VEPCO's proposed project was "better" than the plan in H. Doc. 650 and was "best adapted" to the Congressionally-approved plan "as modified by the pending application," and as approved by the Army Engineers (see I, 205–22).

We should not have burdened the Court with a discussion of this point, had it not been for the fact that the Examiner and the Commission arrived at conclusions which are meaningless, unless it were assumed that the comprehensive plan of development approved by Act of Congress had been modified, as stated by Staff Counsel. These conclusions are (I, 67–8) that "the project proposed is in harmony with the approved compre-

hensive plan," and that it is "best adapted to the Congressionally-approved comprehensive plan." Since the Roanoke Rapids unit is an integral part of the Congressionally-approved comprehensive plan, there is no meaning in these words. The conclusions could have meaning only if it were assumed that, through some modification, the Roanoke Rapids unit has been eliminated from, and is no longer a part of, the Congressionally-approved plan.

Respondents' reasoning on this subject is different. They start with the proposition that, when a project is approved or authorized, Congress does not "freeze" the work of improvement in all its details. The details of the work are left to the judgment of the Chief of Engineers, and they have made changes in "minor details," including those of the Buggs Island unit. Since *minor details* are subject to change by the Army Engineers, Respondents argued, it was proper for the Army Engineers now to favor a plan which would include a non-Federal development of Roanoke Rapids. This argument was adopted by the Examiner (IR, 1076), concluding with the statement that—

> Such difference as exists [between Roanoke Rapids in House Document 650 and VEPCO's proposed project] does no violence to the comprehensive plan of the Chief of Engineers as "approved" by the Congress.

The Court of Appeals apparently adopted the Examiner's treatment of this question by saying (V, 43):

> The general approval given the original plan did not make its details a matter of statute or freeze the development of the project so as to preclude minor changes which would add to its feasibility and efficiency.

The propositions quoted above are conceded by Petitioners, especially since Congress authorized the construction of the Buggs Island and Philpott reservoirs, not as presented in H. Doc. 650, but "substantially in accordance with the recommendations of the Chief of Engineers in that report" (App. p. 23). However, *the ownership and control of a project is not a matter of minor detail.*

Granting that the Chief of Engineers may change the height of a dam or its location within reasonable limits, he cannot change a development from Federal to non-Federal, or even transfer the responsibility from one Federal agency to another. If Colonel Gee had to go before the House Committee on Public Works to urge a change in the step-by-step order of the river basin development, after it had been approved with a specified order of construction, it follows, as a matter of course, that the Chief of Engineers or his subordinates could not so modify the Con-

gressionally-approved comprehensive plan as to release Roanoke Rapids to private development.

VI. THE ROANOKE RAPIDS PROJECT HAS BEEN WITHDRAWN FROM THE LICENSING AUTHORITY OF THE COMMISSION

Since, by act of Congress, the United States has entered upon the project of improving the Roanoke River Basin by means of the 11 dams and reservoirs constituting the comprehensive river basin plan, it follows that the Commission was without power to issue a license for Roanoke Rapids, which is one of the project units in this plan. Congress has made one disposition of the Roanoke Rapids site; the Commission is, therefore, without authority to set aside this Congressional determination and make a different disposition of the site.

We submit that (A) this conclusion is supported by the provision in the statute vesting jurisdiction in the Department of the Army; (B) this effect of the statute is clear enough; and (C) Congress was not required to pass legislation reaffirming its previous enactment.

A. BOTH THE INVESTIGATIONS AND THE IMPROVEMENTS HAVE BEEN VESTED IN THE DEPARTMENT OF THE ARMY

The Roanoke Rapids site has been withdrawn from the licensing jurisdiction of the Commission, not only by virtue of the adoption of the comprehensive plan recommended by the Chief of Engineers in H. Doc. 650, but also by the pro-

vision in the Flood Control Acts of 1936, 1938, 1941, and 1944 (a provision of general law 33 U. S. C. 701a–1) vesting jurisdiction over such investigations and improvements exclusively in the Department of the Army, "except as otherwise provided by Act of Congress" (App. p. 5).

Respondents argued in the proceedings below that the clause "except as otherwise provided by Act of Congress" implies "except as provided in the Federal Power Act". The Commission apparently adopted this suggestion when it held that the Roanoke Rapids site had not been removed from its licensing jurisdiction (I, 44). This contention, however, is refuted by (1) the exceptions actually made in Acts of Congress, and (2) the history of the Flood Control Act of 1944 with respect to this provision.

(1) The clause "except as otherwise provided by Act of Congress" has reference to specific enactments vesting jurisdiction otherwise than in the Department of the Army. One example is presented by Section 9 of the Flood Control Act of 1944 (App. p. 20), where plans for the improvement of the Missouri River Basin were approved to be undertaken jointly by the Department of the Army and the Department of the Interior.

Another example is presented by Section 4 of the Flood Control Act of 1938 (App. p. 13), where a comprehensive plan for the Arkansas River Basin was approved to be carried out by

both the Department of the Army and non-Federal interests, with the proviso that:

> * * * the Federal Power Commission is hereby authorized and directed to retain and exercise the authority heretofore conferred on it by law with respect to that portion of the project constructed and operated for power purposes: * * *

There would have been no need for this specific proviso, had it been the intent of Congress, by the use of the phrase, "except as otherwise provided by Act of Congress", to leave the licensing authority of the Commission undisturbed with reference to project sites included in comprehensive plans for river basin development recommended by the Chief of Engineers and approved by Congress.

(2) After the phrase "except as otherwise provided by Act of Congress" was incorporated in the 1936 Act and carried in the 1938 and 1941 Acts, and while H. R. 4485 was before the Senate Committee on Commerce, the Federal Power Commission recommended[97] that—

> a proviso be added to the bill that nothing therein shall be construed to limit the authority and function of the Federal Power Commission as provided by Acts of Congress.

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[97] Hearings before the Senate Committee on Commerce on H. R. 4485, 78th Congress, 2d Session, p. 12.

The proviso recommended by the Commission was not adopted. This is proof positive that the licensing authority of the Commission cannot be asserted with respect to this project, under the authority of the clause "except as otherwise provided by Act of Congress".

As further proof to this effect, it may be noted that in later legislation (for example: Section 6 of the Rivers and Harbors Act of 1945 (App. p. 29), Section 7 of the Rivers and Harbors Act of 1946 (App. p. 30), and Section 110 of the Rivers and Harbors Act of 1950 (App. p. 31)), Congress did adopt this suggestion in the following language:

> * * * * *That this section* shall not be construed to interfere with the performance of any duties vested in the Federal Power Commission under existing law * * *. [Emphasis supplied.]

In each instance the *section* referred to was one in which the Secretary of the Army was authorized and directed to make preliminary investigations and surveys under these river and harbor acts. The proviso was not adopted as a limitation on the jurisdiction of the Department of the Army over investigations and improvements as provided in 33 U. S. C. 701a-1 (App. p. 4), nor was it made applicable to projects "adopted and authorized", or to plans of development "approved" by Congress upon recommendation of the Chief

of Engineers, or even to the provisions authorizing investigations and surveys under the flood control acts. The effect of the proviso in these provisions was to leave the jurisdiction of the Commission undisturbed pending the investigations and surveys to be made by the Army Engineers *under the authority of these particular sections* in the river and harbor acts.

With respect to projects "adopted" by Congress, the clause "except as otherwise provided by Act of Congress" does relate to the jurisdiction of the Commission in that it is vested with the function of recommending to the Secretary of the Army the installation of penstocks and other facilities to adapt the flood control dams to development of hydroelectric power (App. pp. 11, 16, 22–3, 27, 32). This marks the extent of the Commission's jurisdiction with respect to the project units in the comprehensive plan for the development of the Roanoke River Basin.

B. THE EFFECT OF THE STATUTE TO WITHDRAW ROANOKE RAPIDS FROM THE LICENSING AUTHORITY OF THE COMMISSION IS CLEAR ENOUGH

The court below held (V, 35):

> Had Congress intended to withdraw all the projects of an approved general plan from the licensing power of the Commission, there was no reason why this would not have been done plainly and explicitly. In the 1928 Boulder Canyon Project Act (45

> Stat. 1057, 1062) it was provided that the Commission should not issue licenses affecting the Colorado River. A similar ban was placed on the granting of licenses to construct projects in the Potomac River Basin (45 Stat. 1012). It is only reasonable to conclude that if Congress, having established a Federal Power Commission as a special administrative body to handle power projects, desired to strip the Commission of a great part of its control over the important rivers of the nation, it would have said so expressly and not by indirection.

The answer to this statement is clear: In its legislative function, Congress is not limited to one set of words and phrases, or to one mode of expression. The purpose of statutory interpretation is to ascertain the legislative intent, and this involves both the meaning and the effect of the legislation. Where the effect of a statute flows by necessary implication, it is not necessary to spell it out. Here, the effect is sufficiently plain and explicit, just as the withdrawal of the Boulder Dam Canyon Project itself from the licensing power of the Commission was sufficiently plain and explicit (App. p. 67). The temporary withdrawal of the Colorado River from the licensing jurisdiction of the Commission, as also the permanent withdrawal of a part of the Potomac River, presented a different prob-

lem which required the use of different language (App. p. 60).

Respondents argue that a project is withdrawn from the licensing authority of the Commission if the project is "authorized", but not if it is "approved" (Comm'n, p. 15). But even where a project is "authorized", the withdrawal is one by implication. To say that withdrawal of project sites from the licensing power of the Commission can be effected only in *haec verba,* and not by necessary implication, would mean that even where there was authorization of appropriations for the construction of a particular project unit, and even where construction had actually begun, it remains within the licensing power of the Commission. Thus, the holding of the court in the case at bar is in conflict with its own decision in *Savannah River Electric Company* v. *Federal Power Commission,* 164 F. (2d) 408. The provision made by Congress with reference to the Savannah River Basin was exactly the same as its provision with reference to the Roanoke River Basin (App. p. 23). Yet, there the court found no difficulty in holding that the *effect* of the statute was to withdraw the Clark Hill unit on the Savannah from the licensing power of the Commission. The court below quoted from its opinion in the *Clark Hill case,* to distinguish it from the case at bar, but it failed to apply that part which shows that the *effect* of the Flood

Control Act of 1944 was to withdraw the project from the Commission's licensing jurisdiction. There the court said (*loc. cit.*, pp. 411–12):

> Under the facts as stated, there is grave doubt as to whether there was jurisdiction in the commission to entertain an application for a private license or make recommendations to Congress as to the development of the project.

After stating the substance of the provisions of Section 4 (e) and 7 (b) of the Federal Power Act, the court continued as follows:

> These provisions of the statute, however, are to be given a reasonable construction, and it could hardly have been intended that under them the commission should have jurisdiction, in the case of projects which Congress had expressly taken over for the United States and upon which work was going forward under appropriations made by Congress, to entertain applications for license from a private corporation or to make reports to Congress as to the relative merits of private and public construction. It is not reasonable to assume that Congress intended that, in such a case, the commission should interfere with the public project by granting a license to a private company to construct the same project or that the commission should make recommendations to Congress with respect to a matter that Congress had already decided.

The fact that that case dealt with a project unit for which appropriations had been made and construction was begun, as distinguished from the Roanoke Rapids unit for which appropriations have not yet been authorized, did not render the meaning and effect of the statute less plain or less explicit. (See also pp. 240–4, *infra*.)

C. CONGRESS WAS NOT REQUIRED TO REAFFIRM ITS PREVIOUS ENACTMENT

Referring to Colonel Gee's testimony before the House Committee on H. R. 5472, the court below said (V, 38):

> Congress was thus thoroughly advised of the position that was being taken by the responsible governmental agencies as to the meaning of the Act. The fact that it has not taken action to withdraw projects within the plans approved from the licensing power of the Commission, is an indication that it concurs in that position.

Implied in this statement is the proposition that when Congress was advised that the Army Engineers and the Commission did not regard the Roanoke Rapids site as having been withdrawn for Federal development, it should have passed an act indicating a contrary intent; otherwise, the position taken by these agencies, rather than the Flood Control Act of 1944, prevails. We submit that this proposition is untenable.

(1) It is incorrect to say that Congress was advised. Congress cannot be said to be advised

until the matter is considered or debated in both Houses. Here, it can be said at most that the House Committee was advised; it cannot even be said that the House of Representatives was advised.[98]

(2) It is incorrect to say that the Committee was "thoroughly advised of the position being taken by the responsible governmental agencies as to the meaning of the Act", meaning the Corps of Engineers and the Federal Power Commission. The Committee was fully advised of the views of Colonel Gee, but his views were in conflict with the recommendations of the Chief of Engineers in 1944 (App. p. 23), and with the statements of the Chief of Engineers on the same day that Colonel Gee testified before this very Committee. It was on the same day that General Pick, in describing the magnitude of the flood-control program, referred generally to all of the comprehensive plans approved by Congress, including the project units for which appropriations had not yet been authorized (App. p. 110).

The Committee was not advised of the Commission's views at all. At that time there was only an application before the Commission, and the hearing had just commenced before the Examiner. No views had yet been expressed by the Com-

[98] Compare p. 135, *supra*, where failure of the committee to act was treated by the court below as "action taken by Congress".

mission, or even by the Examiner. The Commission Staff, as the Examiner stated (I, 189), undertook to act as advocates in support of VEPCO's application. This was the posture of affairs when Colonel Gee testified before the House Committee. If the court's opinion rests on the assumption that the position taken by the Staff was the view of the Commission, then there was no need of any hearing before the Examiner or the Commission.

(3) There was no occasion for Congress to withdraw Roanoke Rapids from the licensing authority of the Commission upon Colonel Gee's testimony, because it had already been withdrawn in 1944. Respondents seem to argue that it was incumbent on the Secretary to take steps to have the Roanoke Rapids site withdrawn again, in order "to foreclose approval of that application" (Comm'n, pp. 28–9). We think that this argument involves a case of mistaken identity. Respondents, not Petitioners, had argued that the Congressionally-approved plan had been modified by the pending application and by the Army Engineers. Hence there was no occasion for the Secretary to seek the aid of Congress to foreclose approval of the application.

(4) Looking at the facts as they actually were, the above quoted statement of the court really means that, when the Congressional committee learned that an application was filed for Roanoke

Rapids, it should have caused Congress to pass an act reaffirming the applicable provisions of the 1944 Act; otherwise, the rights of the United States were forfeited.

(5) Congress does not sit as a supervisory administrative tribunal over the Commission. When Congress passes a law, the Commission is bound by it. It is neither the function, nor the practice, of Congress to watch out for or to anticipate possible misapplications of the law by the Federal Power Commission in order to correct such misapplications in advance by the passage of preventive legislation, reaffirming its previous enactments.

Part Three. Prohibition of Section 7 (b) of the Federal Power Act

Assuming, for the purpose of this argument, that Section 10 of the Flood Control Act of 1944, taken by itself, falls short of reserving the Roanoke Rapids site for development by the United States, we submit that the Commission was prohibited by Section 7 (b) of the Federal Power Act from approving VEPCO's application.

This section provides as follows:

> *Whenever,* in the judgment of the Commission, the development of *any water resources* for public purposes should be undertaken by the United States itself, the Commission *shall not approve* any application for *any project affecting such development,* but shall cause to be made such

> examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [Emphasis supplied.]

There are thus two conditions precedent attending the prohibition in Section 7 (b): These conditions are that (I) the Commission arrive at a judgment that the development of water resources for public purposes should be undertaken by the United States, and (II) that the application for a license be one for a project which would affect such development. We shall demonstrate that (III) the prohibition of Section 7 (b) has taken effect, but that the court below misinterpreted this provision, and (IV) that it did not apply the provision as enacted by Congress.

I. THE COMMISSION HAS EXPRESSED ITS JUDGMENT

Whether the Commission has or has not expressed its judgment, that the development of the water resources of the Roanoke River Basin should be undertaken by the United States, is a question of fact. We shall, therefore, set forth the facts showing that the Commission had expressed its judgment that (A) *the entire comprehensive plan* should be undertaken by the United States and, in the alternative, that (B) the construction of *Buggs Island* should be undertaken by the United States.

A. THE COMMISSION'S JUDGMENT AS TO THE COMPREHENSIVE PLAN

Before submitting his report to Congress, the Chief of Engineers, in accordance with established practice (App. p. 79), transmitted the reports of the District Engineer, the Division Engineer and the Board of Engineers for Rivers and Harbors to the Federal Power Commission.

On May 3, 1944, the Chairman of the Commission, in a letter to the Chief of Engineers, expressed the views of the Commission with respect to the comprehensive plan recommended by the Army Engineers as follows:

> Based upon the consideration given hereinbefore, and upon careful review of the reports of your Department, the Commission *concurs in the conclusion* of the Board of Engineers for Rivers and Harbors *that the comprehensive development* of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer *consisting of 11 dam and reservoir projects* with power, *is desirable* and *that the Buggs Island and Philpott projects* would constitute *a desirable initial step* in the development of the Roanoke River Basin. [Emphasis supplied.]

Since the Commission concurred in the recommendation of the Board of Engineers for Rivers and Harbors, one must look to the recommendation of the Board to see what it was that the Commission concurred in.

When the Board recommended a comprehensive plan "at an estimated cost of $124,000,000" (I, 145), it did not mean that only a part of this construction cost should be incurred by the United States and that the remainder should be incurred by private interests. This is evident from the statement that "the estimated *Federal* construction cost, including transmission facilities, is $124,000,000" (I, 148).

When it recommended that "to safeguard the interests of navigation and flood control the dams and power facilities should be constructed, operated and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers" (I, 149), it meant that this should be not only a Federal project, but that it should be an Army project. Private developments are not constructed, operated and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers.

When it recommended that of the 11 units at the specified sites, Buggs Island and Philpott should constitute the "initial step," with "the other units of the plan to be constructed at such rates as future developments may indicate desirable" (I, 150), it meant that the Army Engineers should first construct Buggs Island and Philpott, and that the other nine units should be con-

structed by them in the order recommended in the report when Congress gave the green light.

This is what the Board recommended, and this is what the Commission concurred in.

The Commission's concurrence in the conclusion of the Board of Engineers for Rivers and Harbors thus constituted an expression of the Commission's judgment that the development of the water resources of the Roanoke River basin should be undertaken by the United States. The Commission's reference to the 11 dam and reservoir projects included the Roanoke Rapids unit.

In a similar manner the Commission concurred in the recommendations of the Board with respect to the development of the Savannah River, and many other developments (App. pp. 186–218). Until December 22, 1950, this was the exclusive manner in which the Commission carried out its responsibilities under Section 7 (b) of the Federal Power Act (App. pp. 79–80).

In House Document 657, 78th Congress, 2d Session, dealing with the development of the Savannah River Basin, the Commission concurred in the following language:

> The Commission has given careful consideration to the reports of your Department and to the studies and views of the Commission staff *and concurs in the recommendations* of the Board that *the 11-project plan for the comprehensive development* of the Savannah River for

> flood control, navigation, hydroelectric power, and other beneficial uses, as proposed by the district engineer, with certain modifications, and the inclusion of transmission facilities, *is desirable* and should be authorized now and undertaken on a step-by-step basis. The Commission *agrees* with the Board that the *Clark Hill Project* would constitute *a desirable initial* step in the development of the Savannah River, the initial *installation* to consist of about 120,000 kilowatts and provisions to be made for an ultimate installation of not less than 200,000 kilowatts. [Emphasis supplied:]

The question whether this was an expression of a judgment which invoked the prohibition of Section 7 (b) of the Federal Power Act came up in the *Matter of Savannah River Electric Company,* 6 F. P. C. 317. There, the Commission found, in support of its order dismissing the application of the Savannah River Electric Company for a license to construct a project at Clark Hill, that it had concurred in the recommendation of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Savannah River should be authorized and undertaken by the United States on a step-by-step basis.

Analogously, it must be concluded in the present case that the Commission's action constituted an expression of its judgment that the compre-

hensive development of the Roanoke River Basin be undertaken by the United States, on a step-by-step basis. The Commission could not have intended otherwise. Surely, it could not have meant that the less economical units should be constructed by the United States, while the choicest power sites should be turned over to the private power companies along with the benefits resulting from the Government's investment in the upstream projects.

Therefore, we submit, the Commission's judgment was, *as a matter of fact,* that the development of the water resources of the Roanoke River Basin as a whole should be undertaken by the United States.

It would appear that, whatever may be the ultimate result reached, there should be no reason for avoiding an unequivocal finding as to this fact. Despite our requests (App. pp. 227–31), however, the Examiner, the Commission and the court below avoided a finding of this simple fact.

B. THE COMMISSION'S JUDGMENT AS TO BUGGS ISLAND

Respondents argued that in its letter of May 3, 1944, the Commission recommended that the United States should construct only Buggs Island and Philpott (I, 181–2, see also Comm'n. p. 30). But this is not borne out by the letter itself. The Commission stated that the comprehensive plan, "consisting of 11 dam and reservoir projects with power, is desirable", and that Buggs Island and

Philpott would constitute "a desirable initial step".

If the expression used with reference to Buggs Island and Philpott spelled a recommendation for Federal development, the same was the expression and the same was the recommendation with respect to the comprehensive plan as a single project. The Examiner, the Commission, and the court below avoided making a finding of fact even as to Buggs Island.

For the purpose of this argument, we shall assume, in the alternative, that the Commission's concurrence in the recommendation of the Board constituted a judgment that the construction of Buggs Island should be undertaken by the United States, and we shall demonstrate that the prohibition of Section 7 (b) against approval of VEPCO's application is not avoided by this assumption.

II. VEPCO'S PROPOSED PROJECT WOULD AFFECT THE FEDERAL DEVELOPMENT

We, therefore, come to the second condition precedent to the prohibition of Section 7 (b); namely, that the proposed project is one "affecting such development". Whether VEPCO'S proposed project at Roanoke Rapids would or would not affect the development, which in the Commission's judgment should be undertaken by the United States, is also a question of fact.

The facts of record show that VEPCO's proposed project would affect the Federal development, whether it be (A) the comprehensive development of the Roanoke River Basin or (B) the development of the Buggs Island site.

A. EFFECT ON THE COMPREHENSIVE PLAN.

VEPCO's proposed project would affect the comprehensive plan in three ways: (1) it would reduce the feasibility and the net power benefits of the comprehensive plan; (2) it would reduce the power capacity of the Gaston unit, or would require additional expenditures by the United States to retain the same capacity; and (3) it would reduce the amount, and increase the cost, of the power available to the Secretary of the Interior for disposition in accordance with the standards prescribed in Section 5 of the Flood Control Act of 1944.

(1) *Effect on feasibility and power benefits*

The Applicant's proposed project would adversely affect the Congressionally-approved comprehensive plan by diminishing its feasibility and its power benefits. The Roanoke Rapids unit is the most feasible of the project units in the approved plan. Based on 1941 estimates, the Roanoke Rapids unit has a feasibility ratio of 2.60. The feasibility ratio of the entire comprehensive plan is 1.47 (I, 144–145). According to VEPCO's own Exhibit 53 (I, 222), the elimina-

tion of the Roanoke Rapids unit from the comprehensive plan would mean that the remaining units would have a feasibility ratio of 1.34. The drop in the feasibility ratio from 1.47 to 1.34 represents an annual reduction of over $1,480,000 in gross power benefits or over $900,000 in net power benefits to the United States (I, 144).

Based upon 1948 estimates, this unit will involve annual power benefits of $2,669,000, and an excess of benefits over costs in an amount of $1,518,000 (Exhibit 54, I, 223). On the basis of the 1948 estimates, the comprehensive plan would be adversely affected in an amount in excess of $1,500,000 per year, or in excess of $75,000,000 for the 50 year period of the license, if the Roanoke Rapids unit were to be developed by VEPCO, instead of by the Government.

In the court below, however, Respondents argued that the net power benefits of the plan would not be affected, because the same benefits would flow from Roanoke Rapids, whether constructed by the United States or by VEPCO. The fallacy in this argument lies in the use of the term "benefits" with two different meanings. The same power may flow, but not the same benefits, either in amount or to the same persons. On the basis of the Commission's finding, the net power benefits of VEPCO's project would be $150,000 per year. The net power benefits of the Roanoke Rapids unit in the comprehensive plan

would amount to more than $1,500,000 per year. The former would inure to VEPCO; the latter, to the people in the area.

By its Exhibit 53, VEPCO conceded that there would be a substantial adverse effect on the Government development, and the Commission made no finding to the contrary.

(2) *Effect on Gaston*

It is also borne out by the testimony of the witnesses for both VEPCO and the Secretary (I, 253–274) that the construction of VEPCO's proposed project, with a pool elevation of 132 feet, would adversely and substantially affect the Gaston unit in the comprehensive plan, because the reservoir of the proposed project at Roanoke Rapids would back up against, and diminish the head of, the Gaston unit. This would result in the diminution of the capacity and output of the Gaston unit. This fact is also borne out by the report of the Chief of Engineers, introduced as Exhibit 8 (I, 194).

VEPCO's witness testified in this connection that the Gaston unit in the comprehensive plan could be moved upstream, in which case the reservoir of the proposed project would not back up against the Gaston unit. This witness also testified, however, that a tailrace costing some $740,000 would have to be excavated at Gaston, in order to compensate for the loss in head (R. 333, see also I, 263).

The Commission made no finding as to the effect of the proposed project on the Federal development in this respect. Impliedly, it did recognize that VEPCO's proposed project would materially and adversely affect the Gaston unit, when it included a provision in the license reading as follows (I, 75):

> The applicant shall make adequate investigations of the suitability and the economic feasibility of the proposed relocated Gaston site and obtain the approval of the Commission before establishing finally the height of the Roanoke Rapids pool at elevation 132 mean sea level.

(3) *Effect on the Secretary's disposition of power*

The ownership and operation of Roanoke Rapids by VEPCO would substantially and adversely affect the disposition of power from the Roanoke Basin units by the Secretary of the Interior under Section 5 of the Flood Control Act of 1944. It is axiomatic that, if this unit is withdrawn from the comprehensive plan, the volume of power available for disposition by the Secretary of the Interior would be diminished by 58,800 kw. and over 357,700,000 kwh. per year. The uncontradicted evidence also shows that the cost of the power from Buggs Island and Roanoke Rapids combined would be 4.16 mills per kwh., whereas the cost of power from Buggs Island alone would

be 5.10 mills per kwh.[99] (I, 279). This alone should settle the question whether the proposed project would adversely affect the Federal development in the disposition of power.

B. EFFECT ON BUGGS ISLAND

Assuming that the Commission's judgment, in its letter of May 3, 1944, was to the effect that only Buggs Island and Philpott should be developed by the United States, VEPCO's proposed project would affect such development. What has been said, under the heading of "Effect on the Secretary's disposition of power," applies generally to the entire comprehensive plan and particularly to Buggs Island.

Whatever may be the disputes concerning the marketability or the marketing of Buggs Island power, one fact remains undisturbed: As between the cost of power from Buggs Island and Roanoke Rapids operated as a single enterprise and the cost of power from Buggs Island alone, there is a difference of 1 mill per kilowatt hour. This alone means that the issuance of a license for Roanoke Rapids would affect Buggs Island power in the amount of $431,000 per year (I, 155). In addition, with Roanoke Rapids withdrawn, the low load factor power of Buggs Island becomes

[99] Respondents (VEPCO, p. 9) rest on the Examiner's finding that the contention that, without Roanoke Rapids, Buggs Island power would have to be sold at higher rates "is highly speculative and unrealistic" (III, 1113). There was not an iota of evidence to support this finding.

less adaptable to meet the requirements of public bodies and cooperatives.

III. APPLICATION OF SECTION 7 (b)

As the statute reads, when the Commission arrives at a judgment that the development of water resources should be undertaken by the United States, and the application is for a project which would affect such development, the prohibition against approval of the application takes effect.

The court below, like the Examiner and the Commission, avoided this simple application of Section 7 (b) by (A) constricting the scope of this provision, and by (B) reading a period of limitations into its prohibition. We shall therefore analyze the provision with special reference to these questions.

A. THE SCOPE OF SECTION 7 (b)

As in the case of any other statutory provision, the scope of Section 7 (b) is determined by its language, and therefore the meaning of the words used has to be ascertained.

(1) *Meaning of "whenever"*

The first word in Section 7 (b) is "whenever" which means "at whatever time" (Webster's *New International Dictionary*). It means that if *at any time* the Commission arrives at a judgment that the development of water resources for public purposes should be undertaken by the

United States, the prohibition of the section takes effect against the approval of any application for any project affecting such development. The section comes into operation, whether such judgment is arrived at by the Commission in connection with an application for a license under Section 4 (e) of the Act (App. p. 33), or in connection with an investigation under Section 4 (g) of the Act (App. p. 35), or in connection with an investigation under Section 311 of the Act (App. p. 40), or in connection with any study or consideration of water resources under any other statutory authority.

Respondents dispute this proposition, arguing that the words "Whenever, in the judgment of the Commission" in Section 7 (b) mean "so long as it is the Commission's judgment", and that, therefore, the prohibition against approval of an application ceases as soon as the Commission "by the reason of changed circumstances" arrives at a different judgment (Comm'n p. 31).

We submit that this argument so broadly stated is wholly without merit. It violates the rule that statutes should not be so construed as to lead to absurd results (p. 156, *supra*). A prohibition conditioned upon the choice of the person prohibited is a contradiction in terms. It is inconceivable that Congress should *prohibit* (the words used are "shall not") the Commission from approving an application "as long as" it is the Com-

mission's judgment that the water resources should be developed by the United States, but leave to the Commission the choice of avoiding such prohibition, by saying that "by reason of changed circumstances" it has now reached a "contrary judgment". Such an interpretation of the word "whenever" might have made sense, if the disapproval of the application were made permissive, rather than mandatory. But then Section 7 (b) would not be reconcilable with Section 4 (e), where the approval of applications is made permissive and not mandatory.

We do not contend that the Commission, having expressed a judgment that the development of water resources should be undertaken by the United States, is in all instances forever barred from changing its mind (VEPCO, p. 34). On the contrary, ordinarily the Commission may arrive at such judgment and change its mind either "by reason of changed circumstances" or under the same circumstances. But when the Commission causes its judgment to be transmitted to Congress, orderly process of government requires that the Commission should withdraw its report before changing its mind. The respect due to the Congress would require it. When the Commission arrives at a judgment with reference to a Federal development of a river basin, and transmits this judgment to the Chief of Engineers with full knowledge that it would constitute a basis for

his recommendation to Congress, when the Chief of Engineers bases his findings and recommendations to Congress on the Commission's recommendations, and when Congress, acting upon these findings and recommendations, approves the plan of development, then it is too late for the Commission to change its mind. If it does, such change cannot affect the prohibition.

Another limitation on the word "whenever" is suggested by VEPCO. It argues that Section 7 (b) is applicable only where the Commission arrives at such a judgment in a proceeding on an application for a license (VEPCO, p. 34). But this does violence to the language of the statute. Obviously, "whenever, in the judgment of the Commission" is not the equivalent of "if, when a license is applied for, the Commission finds".

The Examiner stated that Section 7 (b) operates "usually in respect of a particular development for which a license is sought" (III, 1078), which would indicate that the *usual* practice was to make such determinations in proceedings upon applications for licenses. But this statement is not supported by the facts. This has not been the *usual* practice of making such determinations (App. p. 79-80). In fact, the one instance when the Commission did make such a determination in this manner took place nine months after the Examiner made the above statement.

(2) "*In the judgment of the Commission*"

Section 7 (b) creates a prohibition when in the Commission's judgment developments should be undertaken by the United States. Just as there is no limitation as to *when* the Commission may arrive at such judgment, so also there is no limitation as to *how* the Commission should do so. The statute does not provide that this judgment must be arrived at by the Commission on its own initiative or on the basis of its own independent investigation, resulting in its own plan of development. It may arrive at such judgment by concurring in the conclusions reached by other agencies of the Government with which the Commission is required to cooperate under Section 4 (c) of the Act (App. p. 33), as it has done in over 40 instances when reviewing the reports of the Army Engineers (App. pp. 186–218).

The Examiner, however, held that in order to arrive at a judgment which would invoke the operation of Section 7 (b) the Commission must initiate such judgment, not arrive at it by way of concurring in a plan "which has been proposed by others" (III, 1078).

Apparently the court below adopted the same idea when it referred to the letter of May 3, 1944, as "merely an approval of the plan of the Engineers in accordance with the practice to which we have referred" (V, 41).

Whether the letter was "merely an approval" or "an approval," the fact remains that the Commission did approve that plan as a Federal undertaking, and thus expressed its judgment that the development of the water resources of the Roanoke River Basin should be undertaken by the United States. The approval of a plan developed by the Army Engineers, and the transmission of the letter of May 3, 1944, pursuant to an established practice, with knowledge that it would be made a part of the Chief of Engineer's report to Congress, make the approval and recommendation more, rather than less, significant.

Had the Commission made its recommendation directly to Congress, the delays incident to Congressional action would have enabled the Commission to make various representations confirming, modifying or even revoking its previous judgment. When it transmitted the letter to the Chief of Engineers, it knew from past experience that he would act with dispatch, and that Congress would act upon his recommendation. In these circumstances, therefore, rather than being "merely an approval", the letter was an approval of importance too great to be discounted.

(3) "*Water resources for public purposes*"

Section 7 (b) of the Federal Power Act provides that whenever it is the Commission's judgment that "water resources for public purposes" should be developed by the United States, it

shall not approve any application for any "project affecting such development". In this respect Section 7 (b) is broader in scope than its predecessor provision in the Federal Water Power Act of 1920 (App. p. 37).

When the Federal Water Power Act was passed, Congress still concerned itself with individual "projects", as defined in Section 3 (11) of the Act (App. p. 32), i. e., with "units of development". The primary right to construct a "project" was in the United States, and if the Commission did not think that the Federal Government should undertake the construction of a given project, then it could grant a license for it. If, however, its judgment was that the Government should undertake the development of *a project*, then the Commission was prohibited from granting an application for the same project. The juxtaposition in this statute was between the project which the Commission thought should be constructed by the United States and the project for which an application was filed with the Commission. Under Section 7 (b) of the Federal Power Act, the juxtaposition is not between the Federal and non-Federal development of a *project*, but between a Federal *water-resource development* and a *project* (affecting such development) for which an application is filed (App. pp. 68–9). The provision, adopted in 1935, reflects the change which was taking place in

Congressional policy toward comprehensive river basin developments.

The Examiner, in his treatment of the question of whether the Commission had rendered itself *functus officio* with respect to the comprehensive plan, stressed that it had not recommended that Roanoke Rapids should be constructed by the United States (III, 1078), thus indicating that both the Federal development and the application for license must relate to the same project. He reduced the scope of Section 7 (b) of the Federal Power Act to that of the latter part of Section 7 of the Federal Water Power Act, saying (III, 1078):

> It is obvious that Section 7 (b) calls for submission of findings and recommendations directly to Congress (*usually in respect to a particular or individual development for which a license is sought*) and not in the form of comments on a comprehensive plan covering an entire river basin, which has been proposed by others." [Emphasis supplied.]

Substantially the same view was taken by the court below when it said (V, 32–3):

> * * * Congress has provided in section 7 (b) of the act, heretofore quoted, that whenever in the judgment of the Commission the development *of any project* should be undertaken by the United States itself, the Commission shall not approve "any

> application for any project *affecting such development*", but shall submit to Congress its findings and recommendations with regard thereto. [Emphasis supplied.]

Although the court quoted the phrase "affecting such development" it gave no effect to it. Otherwise it would have considered the effect of VEPCO's proposed project on Buggs Island, which Respondents admitted (p. 212, *supra*) had been recommended by the Commission as a Federal undertaking.

(4) "*Affecting such development*"

"To affect", derived from *ad facere*, means "to do something to." In legislation establishing a means which would bring about a beneficial result, the prohibition, against anything "affecting" such means, is at times intended as a prohibition against anything *adversely* affecting such means. We shall assume, for the purpose of this case, that this limitation on the term "affecting" is implied in the purpose of the prohibition in Section 7 (b).

VEPCO, however, argued in the court below that the phrase "affecting such development" in Section 7 (b) means "physically affecting such development." Its argument was, in substance, that the proposed project would physically affect Gaston, but that can be avoided by VEPCO's taking over this site as well as Roanoke Rapids; and

that the other effects on the comprehensive plan or on Buggs Island are financial or economic in character, hence they do not count.

Apart from the proposition that withdrawal of Roanoke Rapids from the comprehensive plan does constitute a physical effect on the plan, the argument is without substance. Section 7 (b) prohibits approval of any application for any project "affecting" such development"; it does not say "physically affecting such development". There appears no reason why this statute should be laid in a Procrustean bed and chopped down to size. Surely this is not a compliance with the rule that remedial statutes should be broadly construed and that statutes should be so interpreted as to prefer public rights, rather than a private privilege (pp. 176–9, *supra*).

(5) *Examinations and recommendations to Congress*

After prohibiting approval of any application for any project under the circumstances stated above, Section 7 (b) further provides:

> *but* [the Commission] shall cause to be made such examinations, surveys, reports, plans, and estimates of costs of the proposed development *as it may deem necessary*, and shall submit its findings to Congress, with such recommendations *as it may find appropriate* concerning such development. [Emphasis supplied.]

While the *expression of a judgment by the Commission* (that development of water resources for public purposes should be undertaken by the United States) and *the effect* (of a proposed project on such development) are conditions precedent to the prohibition against approval of the application, the requirement that the Commission shall cause investigations to be made and shall submit its findings and recommendations to Congress is not a condition precedent, but in the nature of a condition subsequent to the prohibition. If the Commission delays in making examinations, surveys, *et cetera,* or fails to make them altogether, the prohibition against the approval of the application nevertheless stands.

This is borne out by the word "but". This word signifies opposition. After a negative directive, followed by an affirmative directive, "but" means "instead". There are two directives in this provision. The first is a negative directive or a prohibition against approval of the application. The second is an affirmative directive which, instead, requires the Commission to make examinations, surveys, *et cetera.* Failure to comply with the second directive does not absolve the Commission from complying with the first.

This is further borne out by the fact that the second requirement is not absolute, but is, in

effect, optional. The Commission is required to make only such examinations, surveys, *et cetera*, "as it may deem necessary" and to submit its findings with such recommendations "as it may find appropriate." If the Commission does not find it necessary to make examinations, or does not consider it appropriate to make recommendations, this statutory requirement is satisfied. This itself is indicative that the requirement cannot be a condition precedent for the prohibition against approval of the application.

The Examiner, the Commission, and the court below treated the requirements of making examinations and recommendations as a condition precedent to the prohibition against approval of the application. According to the Examiner, not only must the Commission make "*its own* examinations, surveys, and estimates of cost", but must submit its own findings and recommendations "directly to Congress". He added (III, 1078):

> The Commission's letter was not addressed either to the Congress or to an officer of a Committee of the Congress.

The Commission apparently adopted the same view when it held (I, 68):

> The concurrence by the Federal Power Commission in the recommendations of the Corps of Engineers contained in House Document No. 650, did not constitute a finding or recommendation submitted to

> Congress under the provisions of Section 7 (b).

The court below arrived at the same result when it said, with reference to the letter of May 3, 1944 (V, 41):

> It is manifest, however, that this letter was * * * not a 7 (b) recommendation to Congress.[100]

It is evident that they have read into the statute a limitation which is not there; namely, that a recommendation to Congress is also a condition precedent to the prohibition. Assuming, however, that the requirement as to making examinations, surveys, *et cetera,* and submission of findings and recommendations, is a condition precedent to the prohibition, we submit that even this condition was satisfied.

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[100] Respondents argue (Comm'n, p. 30) that since the Army plans and recommendations were submitted pursuant to resolutions of committees of Congress (which is not entirely correct, p. 115, *supra*), "the letter of May 3, 1944, can in no sense be construed as a discharge of the Commission's statutory responsibilities under Section 7 (b) to refuse licenses for projects which in its judgment would affect water resources which should be developed by the United States." This reasoning would have validity only if there were an inherent inconsistency between the Commission's functions under Section 7 (b) of the Federal Power Act and the submission of plans and recommendations by the Army Engineers pursuant to resolutions of committees of Congress. If we understand the Commission's argument correctly, it means that the prohibition in Section 7 (b) does not apply, if the Army Engineers also think that the water resources should be developed by the United States.

Here, the examinations, surveys, plans and estimates of cost were not necessary, because they had already been made by the Army Engineers. Section 7 (b) does not require that work already done should be duplicated. Section 7 (b) requires submission of reports so that Congress may, if it so desires, act in accordance with the Commission's recommendations. It does not require the Commission to do a useless thing.

So much for the requirement as to examinations, surveys, reports and estimates of cost. We shall now turn to the requirement as to findings and recommendations.

Assuming that the Commission's findings and recommendations must be submitted to Congress before the prohibition in Section 7 (b) takes effect, we submit that even this condition was satisfied.

In describing our position on this matter, the court below said (V, 41):

> Petitioners contend that the letter to the Chief of Engineers by the Power Commission amounted to a recommendation to Congress, pursuant to Section 7 (b) of the Federal Power Act, heretofore quoted, that all the projects in the plan submitted to Congress should be constructed by the United States.

This is not an entirely correct characterization of our contention. In our briefs and oral arguments before the Examiner and the Commission, and in the court below, we stressed the necessity

of determining whether, *as a matter of fact,* the Commission did, by its letter of May 3, 1944, express its judgment that the development of the Roanoke River Basin (by means of the comprehensive plan) should be undertaken by the United States, not whether *as a matter of law,* such judgment or recommendation was made under Section 7 (b).

As it happened, however, the letter served a dual purpose: *first,* as an expression of the Commission's judgment that the development of the water resources of the Roanoke River Basin should be undertaken by the United States, and *second* (since the letter was sent to the Chief of Engineers with the knowledge that he would make it a part of his report to Congress), as a recommendation to Congress concerning this development.

Here, also, it is important to consider the facts. After the Commission, in its letter to the Chief of Engineers concurred in the conclusions reached by the Board, the Chief of Engineers submitted his report to Congress. After informing Congress that the reports of the Army Engineers had been reviewed by the Commission, and after stating what modifications were suggested by it, he couched his finding in the following language (I, 137):

> After due consideration of these reports [of the Army Engineers] and the com-

> ments of the Federal Power Commission, I find that the comprehensive plan as recommended by the Board provides for optimum development of the water resources of the basin. The authorization should be broad enough to permit the changes suggested by the Federal Power Commission, if found advisable when construction is initiated.

In making his findings and recommendations, the Chief of Engineers thus relied on the comments of the Commission. Congress acted upon the report and approved the comprehensive plan recommended therein, in the light of the Commission's recommendation.

That the letter to the Chief of Engineers constituted a full compliance with the requirement that the recommendation be submitted to Congress, was the view of the Commission itself in the *Matter of Savannah River Electric Co.*, 6 F. P. C. 317. There it was argued that the prohibition in Section 7 (b) did not take effect, and that it would not take effect until the Commission made its own investigations and submitted its report to Congress. The Commission held (p. 319):

> The Commission's recommendations that the Clark Hill project be undertaken by the United States having already been before Congress, no further recommendations need be made to Congress pursuant to section 7 (b) of the Federal Power Act.

This was also the view taken by the court below when it affirmed the Commission's order in *Savannah River Electric Company* v. *Federal Power Commission*, 164 F. (2d) 408.

Therefore, the Commission's recommendation having been submitted to Congress, the Commission exceeded its authority when it thereafter approved VEPCO's application.

B: THE PROHIBITION IN SECTION 7 (b) IS NOT SUBJECT TO A TWO-YEAR PERIOD OF LIMITATION

The court held that even if the letter of May 3, 1944 did constitute a "7 (b) recommendation to Congress", the Commission was not precluded from approving VEPCO's application, since the recommendation "was made in 1944 and Congress has taken no action in the meantime, except with respect to the Buggs Island and Philpott projects" (V, 41). Thus the court held that the prohibition in Section 7 (b) was subject to a two-year period of limitation, after which, if Congress fails to act, the Commission is free to approve an application for a project "affecting such development".

The reasoning behind this holding is that if, under Section 4 (e) of the Federal Power Act (App. p. 35) the Commission may grant a license for the utilization of a Government dam already constructed more than two years after the Commission reports the facts to Congress, it may

certainly grant a license for a project which is not yet in being (V, 41).

We submit (1) that the prohibition in Section 7 (b) is not subject to a two-year limitation, (2) that Congress has acted on the Commission's recommendation within two years, and (3) that the *Clark Hill case* is not distinguishable from the case at bar.

(1) *The two-year period is not applicable to Section 7 (b)*

We submit that the court erred in applying the two-year period of Section 4 (e) to Section 7 (b) and that it failed to recognize the differences in the problems involved in the two provisions.

(a) The court in effect imposed a two-year period of limitation within which Congress must act in order to save a project for Federal development. It has long been established that neither limitations nor laches operate against the United States unless expressly provided by Act of Congress.[101]

Respondents *also* stress that there is no period of limitation in Section 7 (b). After stating that Section 4 (e) provides for a two-year limitation, they say: "There is a complete absence of any similar ban for any period of time in Section 7 (b)" (Comm'n, p. 32). In effect their argu-

[101] *Utah Power & Light Company* v. *United States*, 243 U. S. 389, 409.

ment means that, if the prohibition is not limited in time, the Commission may disregard it altogether. We submit that the fact that Congress chose to limit itself to a two-year period in Section 4 (e) does not sanction the insertion of a two-year period in Section 7 (b), especially since the provisions deal with entirely different problems.

(b) By Section 4 (e) the Commission is *authorized and empowered* to grant licenses for projects, including the utilization of Government dams. It must be emphasized that in no instance is the Commission *required* to grant a license; it is *empowered* to do so, if the statutory conditions are satisfied. The grant of a license to utilize the water or water power of a Government dam is further conditioned by the requirement that, if the Commission finds that the dam may be utilized by the Government for purposes other than navigation, it must report the facts to Congress and then refrain from granting a license for a period of two years. The situations contemplated are as follows:

(i) If the Government dam is purely a navigation dam which cannot be advantageously utilized by the United States for purposes other than navigation, and the Commission is of the opinion that it should grant a license, it may do so.

(ii) If the Government dam is purely a navigation dam, and the Commission finds that *it*

could be utilized advantageously by the United States for purposes other than navigation, *but is nevertheless of the opinion that a license therefor should be issued,* it is required to report the facts to Congress. In such instances, Congress imposed a two-year period of limitation on itself. If Congress fails to make provision for Federal utilization of the navigation dam within that time, the Commission is at liberty to issue a license.

This situation must further be reconciled with Section 5 of the Flood Control Act of 1944, which provides that "power and energy generated at reservoir projects under the control of the Department of the Army * * * shall be delivered to the Secretary of the Interior to be disposed of by him." Therefore, if the Government dam in question is a reservoir project and is under the control of the Department of the Army, the Commission is nevertheless without authority to issue a license. Section 5 of the Flood Control Act of 1944 thus operates to diminish the number of project sites available for licensing under the Federal Power Act, without amendment of the Act (App. p. 19).

(iii) If the Government dam is such that the Commission is of the opinion that it could be advantageously utilized by the United States for purposes other than navigation and that it should be so utilized, then the Commission is prohibited by Section 7 (b) from granting a license. The

Commission is required to make such examinations and surveys as it deems appropriate and to submit reports to Congress, but no period of limitation is provided as to when the ban might be lifted.

In view of the above, the conclusion reached by the court below is erroneous.

(2) *Congress did act on the Commission's recommendation*

Having assumed that there is a period of limitation governing Section 7 (b), the court below said (V, 41):

> The natural resources of the country should not be withheld from needed development because of a recommendation of the Commission on which Congress has failed to act.

But the fact is that Congress has acted, and it has acted well within two years after the Commission's recommendation. Congress approved the very plan which had been approved by the Commission.

It is difficult to understand what the court means by the expression "Congress has failed to act". According to the court, the failure of the House Committee on Public Works to adopt Colonel Gee's recommendation to put Smith Mountain ahead of Gaston and Roanoke Rapids, or even to report the recommendation to the House, constituted "action taken by Congress"

(p. 135, *supra*). On the other hand, the provision on the "Roanoke River Basin" was included in H. R. 4485, 78th Congress, 2d Session, by the Senate Committee on Commerce; it was passed by the Senate; it went to Conference and was approved by the Conferees; the Conference report was approved by both Houses of Congress; finally, the Act was approved by the President, and it became a law. Yet, according to the court, "Congress has failed to act".

(3) *The Clark Hill Case is not distinguishable*

We further submit that the differentiation made by the court between the *Clark Hill case* and the case at bar (V, 41–2), is a distinction without a difference. Whether two cases are distinguishable is best determined by setting forth their similarities and differences to see whether the latter warrant a different result.

(a) *Similarities*

Both the case at bar and the *Clark Hill case* have the following elements in common:

(i) The applicants had previously applied for licenses to construct hydroelectric projects at the same respective sites (Clark Hill and Roanoke Rapids). In the *Clark Hill case,* a license was granted and was later surrendered. In the present case, an application was filed and was later withdrawn.

(ii) The Secretary of War had been authorized and directed to cause preliminary examinations and surveys to be made of the respective

streams (Savannah and Roanoke) for flood control and allied purposes.

(iii) The Army Engineers recommended general plans for the development of the river basins, each plan (a single package) consisting of 11 dams and reservoirs, to be constructed on a step-by-step basis.

(iv) The Chief of Engineers transmitted the reports of the Army Engineers to the Commission for its comments, and the Commission concurred in the recommendations of the Board of Engineers for Rivers and Harbors.

(v) The Chief of Engineers, in his report to Congress, stated that he had relied on the recommendations of the Commission.

(vi) In Section 10 of the Flood Control Act of 1944, Congress "adopted and authorized" and "approved" the two plans in almost identical language (App. pp. 22–3).

(vii) Congress appropriated funds for the construction of units *as initial steps* within these river basin projects, and construction was commenced.

(viii) More than two years after the Commission approved the comprehensive plans for Federal development, applications were filed for licenses to construct projects in lieu of units in the respective plans.

(b) *Differences*

The sole difference between the two cases may be stated as follows:

In the *Clark Hill case;* the application was filed for the unit within the approved plan, for which funds had been appropriated and on which construction had begun; while in the case at bar the application was filed for a unit within the approved plan, for which appropriations have not yet been authorized.

(c) *Difference in result*

In the *Clark Hill case,* the court below raised a doubt as to whether the Commission had jurisdiction even to entertain the application or to make recommendations to Congress as to the development of the project. The court said (*loc. cit.* p. 411):

> It is not reasonable to assume that Congress intended that, in such a case, the commission should interfere with the public project by granting a license to a private company to construct the same project or that the commission should make recommendations to Congress with respect to a matter that Congress had already decided.

Then, assuming that the Commission did have jurisdiction to entertain the application and to make recommendations, the court held that the Commission was right in *dismissing* the application, saying:

> The commission would have stultified itself if, in this posture of affairs, it had granted a license to a private company to

> construct the project, or, in *denying* the license, had offered unsolicited advice to Congress with respect to the merits of private as against public construction, or vice versa. [Emphasis supplied.]

In the case at bar, the court refused to set aside the Commission's order, holding that the Commission could grant a license, since more than two years had passed after its recommendation, and "Congress had failed to act."

We submit that in both instances the Federal developments of water resources approved by Congress were basin-wide in scope and that the observations made by the court in the *Clark Hill case* must apply to the case at bar. Otherwise, the Federal Government would never have any assurance of being able to carry out a long-range comprehensive river-basin program.

If, according to the court below, the test of whether Congress has acted is whether it has appropriated funds for construction and construction has begun, then the case at bar is, nevertheless, on all fours with the *Clark Hill case*. Here the Commission, in its letter of May 3, 1944, recommended that Buggs Island should be constructed by the United States. According to the court's own statement, Congress had *acted* on this recommendation by December 22, 1944, when the law was enacted, which was well within the two-year period of limitation assumed by the Court. VEPCO's proposed project would affect

the development at Buggs Island. Therefore, the Commission was without power to approve VEPCO's application.

The two cases are not distinguishable, *unless* the court actually adopted the Examiner's approach that, for Section 7 (b) to apply, it must appear that both the Commission's judgment and the application must relate to the same project unit (i. e., Roanoke Rapids); that the governing provision is Section 7 of the Federal Water Power Act of 1920, rather than Section 7 (b) of the Federal Power Act of 1935.

IV. THE COURT BELOW HAS NOT APPLIED SECTION 7 (b) OF THE FEDERAL POWER ACT

The court below thus interpreted Section 7 (b) as prohibiting the issuance of a license for a non-Federal development if the following elements are present: (1) The Commission must express a judgment that the construction of a project should be undertaken by the United States, (2) but the judgment must be expressed of its own motion, not merely by way of approval of a judgment expressed by others; (3) the Commission must make its own examinations and submit its recommendation to Congress favoring such Federal development; (4) Congress has two years within which to authorize the construction of such project by a Federal agency; (5) if Congress fails to take such action within this period,

and an application for this project is filed, the Commission is free to issue a license.

To test the validity of this interpretation, let us incorporate it into, and compare it with, the statute as enacted (indicating the differences in italics) as follows:

Section 7 (b) as enacted by Congress	Section 7 (b) as interpreted by the court below
Whenever, in the judgment of the Commission, the development of any *water resources for public purposes* should be undertaken by the United States itself,	Whenever, in the judgment of the Commission, *acting upon its own motion*, the development of any *project site* should be undertaken by the United States itself,
the Commission shall not approve any appliction for any project *affecting such development*,	the Commission shall not approve any application for any project *at such site until two years after*
but, shall cause to be made such examinations, surveys, reports, and estimates of cost of the proposed development as it may find necessary and *shall submit* its findings to Congress, with such recommendations as it may find appropriate concerning such development.	*it shall have caused* to be made such examinations, surveys, reports and estimates of cost of the proposed development as it may find necessary and *shall have submitted* its findings to Congress, with such recommendations as it may find appropriate concerning such development: *Provided, that nothing herein shall be construed as prohibiting the approval of such application at any time before the Commission submits its findings and recommendations to Congress.*

We respectfully submit that the provision applied by the court below is not the provision enacted by Congress.

CONCLUSION

In view of the above, the judgment of the court below should be reversed and the causes remanded with directions to set aside the Commission's order.

Respectfully submitted.

GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the Relation of Oscar L. Chapman, Secretary of the Interior.

OCTOBER 1, 1952.

The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel.

ROBERT L. STERN,
Acting Solicitor General.